84-240

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NANCY FREEDMAN, et al.,

Petitioners,

vs

TRANS WORLD AIRLINES, INC., and
AIR LINE STEWARDS & STEWARDESSES
ASSOCIATION, LOCAL 550, TWU, AFL-CIO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. When, following the signing of a settlement agreement between an employer and a class of discharged employees, liability is adjudicated at the behest of the intervening union in favor of the former employees, does this Court's decision in *Firefighters Local Union 1784* v. *Stotts,* 104 S.Ct. 2576 (1984) require that the standards of Title VII, rather than the provisions of the settlement agreement, govern a district court's power to modify its award of retroactive seniority?

2. May a district court modify the provisions of a decree when circumstances obtaining at the time of its issuance have changed absent the "clear showing of grievous wrong evoked by new and unforseen conditions" of *United States* v. *Swift & Co.,* 286 U.S. 106 (1932)?

3. Must a claim form, furinshed to class members pursuant to Rule 23(d)(2) of the Federal Rules of Civil Procedure, meet the standards of *Mullane* v. *Central Hanover Bank and Trust Co.,* 339 U.S. 306 (1950)?

4. May a district court, prior to approval of a proposed settlement, and in advance of a determination of the precise relief available, require class members to opt into a Rule 23(b)(2) class action?

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ASSOCIATION, LOCAL 550, TWU, AFL-CIO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners[1] respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on March 27, 1984.

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[1] Petitioners are Nancy Freedman, Deanne Avant, Suzanne Baar, Terri Bacchi, Sydney Cain, Chris Carlson, Julie K. Cuomo, Rita K. Davis, Roberta Enright, Janet Filip, Mary Ellen Giles, Regina Goldwag, Lydia Gourvitz, Janice Graham, Edith Halpern, Marianne Hatches, Betty Heisler, Sally Holbrook, Carol Marie Holmes, Sally Ingmanson, Carma Rae Johnson, Pamela Kapaun, Lorna Leonard, Joanne Martinez, Elizabeth McNamara, Barbara Porter, Theresa Poulton, Debby L. Riley, Sandra Roth, Patricia Rudner, Mary Ann Ryan, Lillian Smyth, Beverly Sorenson, Charlotte E. Tiesman, Judy Ann Turpin, Sarah L. Vigil, Priscilla Ann Voight, Patricia A. West, who appear individually and on behalf of similarly situated class members.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-15a) is reported at 730 F.2d 509. The decision of the district court (App. 20a-31a) is unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a). The judgment of the court of appeals was entered on March 27, 1984 (App. 16a-17a); a timely petition for rehearing was denied on May 9, 1984. (App. 18a-19a.)

STATUTES AND RULES INVOLVED

1. This case involves Section 706(g) of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e-5(g), which provides:

> If the court finds that the respondent has intentionally engaged or is intentionally engaging in such unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate . . . No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of § 704(a) of this title.

2. This case also involves Rules 23(d)(2) and 23(e) of the Federal Rules of Civil Procedure:

> (d) Orders in conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders:
>
> * * * (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action . . .
>
> (e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

STATEMENT

This case was brought under Title VII of the civil rights Act of 1964, 42 U.S.C. § 2000e et seq., to seek a remedy for the class of female flight attendants who had been aggrieved by TWA's "no motherhood" policy.[2] In 1976, the district court

[2] "Specifically, TWA maintained a policy of removing female flight cabin attendants from flight duty while pregnant, and thereafter if a child was born. This policy also extended to female flight cabin attendants who adopted a child. These employees who became mothers either by childbirth or by adoption were terminated permanently unless they were willing to accept employment in ground duty positions. This policy, however, did not apply to their male counterparts. Male cabin attendants, designated 'pursers' by TWA, could remain on flight duty after becoming a parent. Although pursers served on international flights, their responsibilities were substantially the same as those of female flight cabin attendants." *In re Consolidated Pretrial Proceedings,* 582 F.2d 1142, 1144 (7th Cir. 1978).

concluded that TWA's policy had constituted unlawful discrimination on the basis of sex. The court of appeals affirmed the finding of liability, *In re Consolidated Pretrial Proceedings in the Airline Cases,* 582 F.2d 1142, 1145-47 (7th Cir. 1978), but concluded that the claims of approximately 92% of the class were barred because they had failed to file timely charges with the EEOC. Id. at 1147-52. Certiorari was sought by plaintiffs, No. 78-1545, and by TWA, No. 78-1549. This Court deferred consideration of the petitions while the parties negotiated a settlement, 442 U.S. 916 (1979).

The settlement agreement provided, *inter alia,* that class members returning to work would receive full competitive seniority for the "compensation period"[3] unless there was a "timely objection of any interested person," in which case the "total amount of seniority and credit for length of service (both accrued and retroactive) for the compensation period will be determined by the Court in its discretion, pursuant to the provisions of Section 706(g), and all other applicable provisions of law, without contest or objection by TWA." (App. 5a.)

The flight attendant union (IFFA) intervened to object to the award of full seniority. After an evidentiary hearing, at which the district court relied upon estimates of the number of class members who would return to work,[4] the trial court found

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[3] The "compensation period" was defined in the agreement as "the period of time which commenced upon the termination of a class member's employment and ends on the date on which the Settlement Agreement is signed by TWA . . ." TWA signed the agreement on June 18, 1979. (App. 5a n.4.)

[4] Along with notice of the settlement (App. 32a-38a), class members received a claim form, which included the question "Do you desire re-employment as a TWA Hostess?" The settlement notice was silent about the significance of responses to this question, which were used to estimate the number of class members who would return to work. 630 F.2d at 1166.

"that full restoration of retroactive seniority would not have an unusual adverse impact upon currently employed flight attendants in any way atypical of Title VII cases." (App. 5a.)

On the IFFA's appeal, the Seventh Circuit upheld the settlement agreement and affirmed the district court's finding of no "unusual adverse impact." *Air Line Stewards and Stewardesses Assn.* v. *Trans World Airlines,* 630 F.2d 1164, 1169 (7th Cir. 1980).

This Court granted IFFA's petition for writ of certiorari, 450 U.S. 979 (1981) to consider whether retroactive seniority could be granted without a finding of discrimination. The Court also granted the cross petitions which had been filed by the plaintiff class and TWA from the Seventh Circuit's 1978 decision.[5] 450 U.S. 979 (1981).

In its decision on the merits, the Court reversed the Seventh Circuit's 1978 ruling that the claims of 92% of the class were time barred. *Zipes* v. *Trans World Airlines, Inc.,* 455 U.S. 385 (1982). The Court held "that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." 455 U.S. at 393 (footnote omitted).

The Court then turned to the union's challenge to the award of retroactive seniority. 455 U.S. at 398-401. The Court viewed the seniority order as having left "to the District Court the final decision as to retroactivity," and concluded that "[t]he award of retroactive seniority . . . is not infirm for want of a finding of a discriminatory employment policy." 455 U.S. at 399.

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[5] The Court subsequently limited the grant of the writ to exclude review of IFFA's question three, whether reinstatement with full competitive seniority would have an "unusual adverse impact." 451 U.S. 980 (1981).

TWA's petition was dismissed as improvidently granted in the Court's decision on the merits. 455 U.S. at 392 n.5 (1982).

Following the decision of this Court, the class asked the district court to modify the decree in two respects. First, class members who were returning to work requested the district court to "award retroactive competitive-status seniority under the standards of *Franks* v. *Bowman,*" 455 U.S. at 492 (Powell, J., concurring), i.e., to order that they be credited with competitive seniority to the date of reinstatement in 1983, rather than to the date of the signing of the settlement decree in 1979, as had previously been ordered. In addition, fourteen class members who in 1979 had not expressed an interest in reinstatement sought to change their election and return to work.[6]

The district court refused to grant seniority to the date of reinstatement on the ground that "there has been no finding that TWA has violated the Civil Rights Act." (App. 29a.) The district court also refused to allow class members who had not opted for re-employment to change their election, concluding that the settlement agreement "require[d] class members to indicate in writing their preference for employment prior to December 2, 1979." (App. 25a.)

The Seventh Circuit affirmed both rulings, although on different grounds. (App. 1a-15a.) The court of appeals appeared to agree with petitioners that there had been a finding of discrimination against TWA (App. 5a), but concluded that the case did not satisfy the standards of *United States* v. *Swift & Co.*, 286 U.S. 106 (1932) for modification of a decree. (App.

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[6] In the nearly four years which elapsed before any class member was reinstated, approximately 36 women changed their mind—22 who had initially sought reinstatement no longer wished to return to work, and 14 women who had initially answered "no" on the claim form, see note 4 *supra*, expressed a desire to return to work.

TWA permitted class members to change their election from reinstatement and obtain the "trip passes" provided for in the decree. TWA maintained, however, that an original indication of a desire not to return to work was irrevocable.

9a.) Nor did the court of appeals agree that modification of the decree was required by Title VII; in the view of the Seventh Circuit, "[t]he grant of additional back seniority ... will primarily harm the incumbent employees ... [and is not] necessary to further the goal of righting the wrong for which TWA is presumably responsible." (App. 10a n.9) As to the decision of the district court to refuse to permit class members to change their election and return to work, the Seventh Circuit rejected the district court's construction of the settlement agreement[7] (App. 25a), holding that "[t]he Settlement Agreement, however, does not state explicitly anywhere that there is a time limit on or before which a class member must indicate her desire to be reemployed." (App. 13a.) Nonetheless, the court of appeals held the settlement agreement required that class members "desiring reinstatement ... complete the form in a manner reflecting that desire." (App. 14a.)

In a timely petition for rehearing, petitioners argued that the Seventh Circuit's concern with "harm to incumbent employees" (App. 10a n.9) was contrary to the decision of this court in *Franks* v. *Bowman,* 424 U.S. 747 (1976) when, as here, there had been a final adjudication that full restoration of retroactive seniority would not have an unusual adverse impact. Petitioners also argued that the court's construction of the "claim form" as a mandatory opt-in requirement was in conflict, *inter alia,* with its decision in *Romasanta* v. *United Air Lines, Inc.,* 717 F.2d 1140 (7th Cir. 1983) that prior to a resolution of seniority issues, "it would be impossible to determine which potential class members 'really' want to return to their positions ... and which 'really' seek only a financial remedy." Id. at 1147. Rehearing was denied without opinion. (App. 18a-19a.)

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[7] The district court had construed the decree as "requir[ing] class members to indicate in writing their preference for reemployment prior to December 2, 1979." (App. 25a.)

REASONS FOR GRANTING THE PETITION

I. Conflict with *Firefighters Local Union No. 1784* v. *Stotts*, 104 S.Ct. 2576 (1984)

The decision of the court of appeals in this case is squarely at odds with this Court's intervening decision in *Firefighters Local Union No. 1784* v. *Stotts*, 104 S.Ct. 2576 (1984) and presents issues of substantial significance to the remedies available in Title VII cases.

In *Stotts*, the Court held that a district court's power to modify an award of retroactive seniority in a Title VII case is to be measured by the standards of the statute, rather than by the provisions of a decree. 104 S.Ct. at 2587 n.9. The decision of the court of appeals in this case is flatly to the contrary.

This Court, in its first decision in this case, held that petitioners are the victims of unlawful discrimination. *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982). Under Title VII standards, petitioners would be entitled to reinstatement with full retroactive seniority, upon the district court's finding, approved by the court of appeals, 630 F.2d 1164, 1169 (7th Cir. 1980) that full restoration of retroactive seniority would not have an unusual adverse impact. *Franks* v. *Bowman*, 424 U.S. 747, 777 (1976). This remedy, however, has been withheld.

Prior to the Court's first decision in this case, the district court had approved a settlement agreement and, pursuant to that agreement, granted petitioners retroactive seniority to June 18, 1979. Petitioners began to return to work in 1983, after this Court had reversed the 1978 decision of the court of appeals and reinstated the district court's decision granting summary judgment to the plaintiff class. It was at that time—after there had been a final determination of the liability issues in their favor—that petitioners sought a modification of the decree to secure full retroactive seniority.

The district court and the court of appeals refused to apply Title VII standards to petitioners' request for full retroactive seniority. In the view of the courts below, the grant of seniority was governed by the provisions of the settlement agreement (App. 29a), which could only be modified under the standards of *United States* v. *Swift & Co.*, 286 U.S. 106 (1932), i.e., upon "a clear showing of grievous wrong evoked by new and unforseen conditions."[8] *Id.* at 119. (App. 6a.)

The refusal of the Seventh Circuit to apply Title VII standards to petitioners' request for full retroactive seniority is manifest in its holding that "[t]he grant of additional back seniority . . . will primarily harm the incumbent employees . . . [and is not] necessary to further the goal of righting the wrong for which TWA is presumably responsible." (App. 10a n.9.) This reasoning was rejected by the Court as "untenable" in *Franks* v. *Bowman*, 424 U.S. 747, 775 (1976) and has no place in Title VII litigation: "If relief under Title VII can be denied merely because the majority group of employees, who had not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed." 424 U.S. at 775, quoting *United States* v. *Bethlehem Steel Corp.*, 446 F.2d at 663. As the Seventh Circuit itself observed in *Romasanta* v. *United Air Lines, Inc.*, 717 F.2d 1140

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[8] When the settlement was approved in 1979, petitioners expected to return to work "in less than half a year." *Air Line Stewards* v. *Trans World Airlines*, 630 F.2d 1164, 1169 (7th Cir. 1980). Nearly four years elapsed, however, before class members returned to work.

The conclusion of the Seventh Circuit to rely upon *Swift* to hold that the three year delay is insufficient to justify a modification of a decree (App. 11a) is seemingly at odds with the standards enunciated in *System Federation No. 91* v. *Wright*, 364 U.S. 642 (1961) and applied in *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 437 (1976). See *Firefighters Local Union No. 1784* v. *Stotts*, 104 S.Ct. 2576, 2604-05 (1984) (Blackmun, J., dissenting); *New York State Association for Retarded Children* v. *Carey*, 706 F.2d 956, 968-71 (2d Cir. 1983); *SEC* v. *Warren*, 583 F.2d 115, 118-20 (3d Cir. 1978).

(7th Cir. 1983), Title VII requires "the maximum measure [of seniority relief] that would not result in 'unusual adverse impact.'" *Id.* at 1156.[9]

The refusal of the court of appeals in this case to apply Title VII standards to petitioners' request for full retroactive seniority is contrary to this Court's subsequent decision in *Firefighters Local Union No. 1784* v. *Stotts,* 104 S.Ct. 2576 (1984). Certiorari should be granted because of the importance of retroactive seniority to Title VII.

II. Claim Forms in Class Actions: An Intra and Inter-Circuit Conflict

This case also raises an important issue concerning the adequacy of class notice and claims forms under Rule 23(d)(2) and 23(e) of the Federal Rules of Civil Procedure.

In the view of the court of appeals, class members irrevocably waived their right to reinstatement without having been advised that their response to a survey, undertaken to estimate the number of returnees, would constitute a binding election. (App. 14a) The decision of the Seventh Circuit on this issue is in conflict with decisions in other circuits and raises important questions concerning the wording of claim forms and class notices in Title VII cases.

The liability phase of a Title VII class action generally proceeds under Rule 23(b)(2) of the Federal Rules of Civil Procedure.[10] Upon a finding of liability in favor of the class, or

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[9] See, e.g., *Association Against Discrimination in Employment, Inc.* v. *City of Bridgeport,* 647 F.2d 256 (2d Cir. 1981); *Mosley* v. *Goodyear Tire & Rubber Co.,* 612 F.2d 187, 191 (5th Cir. 1980); *Moore* v. *City of San Jose,* 615 F.2d 1265, 1272 (9th Cir. 1980).

[10] See, e.g., *Robinson* v. *Lorillard,* 444 F.2d 791, 802 (4th Cir. 1971); *Robinson* v. *Union Carbide Corp.,* 544 F.2d 1258 (5th Cir. 1974); *Senter* v. *General Motors Corp.,* 532 F.2d 511, 525 (6th Cir.

(Footnote continued on following page.)

following a compromise on liability issues, notice under Rule 23(d)(2) may be required to identify potential class members.[11] Responses to such class notice are often used to determine mitigation earnings for back pay computations, and, as in this case, may be used to determine the number of discriminatees who seek reinstatement, thereby permitting the district court to undertake the equitable balancing attendant to the grant of retroactive seniority.[12] *Teamsters* v. *United States,* 431 U.S. 324, 376 (1977).

The Third Circuit has held that the wording of Rule 23(d)(2) notice must meet the standards of *Mullane* v. *Central Hanover Bank and Trust Co.,* 339 U.S. 306 (1950), i.e., that notice "must be sufficiently informative and give sufficient opportunity for response, to satisfy due process." *Kyriazi* v. *Western Electric Co.,* 647 F.2d 398, 395 (3d Cir. 1981). As Judge Wisdom stated in *Robinson* v. *Union Carbide Corp.,* 544 F.2d 1258 (5th Cir. 1977), the notice "should set forth the alternatives as well as any other points of law necessary to understand the notice." Id. at 1265 (concurring opinion). These standards are reflected in the notice approved by the Fourth Circuit in *Sledge* v. *J.P. Stevens & Co., Inc.,* 585 F.2d 625, 652-53 (4th Cir. 1978), where the notice specifically admonished class members that a failure to timely respond to a questionnaire would cause their claim to "be forever barred." Id. at 633 n.10.

(Footnote continued from preceding page.)

1975); *Rich* v. *Martin Marietta Corp.,* 542 F.2d 333, 341 (10th Cir. 1975). But see *Holmes* v. *Continental Can Co.,* 706 F.2d 1144, 1154-60 (11th Cir. 1983), concluding that a (b)(2) employment discrimination class action is properly viewed under (b)(3) standards for back pay determinations.

[11] The Rule 23(d)(2) claim form often accompanies the notice of proposed settlement required by Rule 23(e).

[12] See, e.g., *Knight* v. *Board of Education,* 48 F.R.D. 108, 112-14 (E.D.N.Y. 1969); *Bray* v. *Lee,* 337 F.Supp. 934 (D.Ma. 1972).

The decision of the court of appeals in this case is to the contrary. The Rule 23(d)(2) notice in this case (App. 32a-38a) fails to state that any class members who did not opt for reinstatement would irrevocably waive such relief. On the contrary, the class notice is completely silent about the significance of the question on the claim form of "Do you desire reemployment as a TWA hostess?" Nonetheless, the court of appeals held that the notice was sufficient to advise class members that, in order to secure reinstatement, they must "complete the [claim] form in a manner reflecting that desire." (App. 14a.)

The timing of Rule 23(d)(2) claim forms is a second issue presented by this case. In *Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978), the Fifth Circuit held that class members could not be required to opt into a settlement before a final determination of its propriety had been made. Similarly, in *Romasanta* v. *United Air Lines, Inc.*, 717 F.2d 1140 (7th Cir. 1983), a different panel of the Seventh Circuit held that, prior to a resolution of seniority issues, a survey of class members was impracticable because "it would be impossible to determine which potential class members 'really' want to return to their positions . . . and which 'really' seek only a financial remedy." Id. at 1147. The decision of the court of appeals in this case is to the contrary.

Certiorari should be granted to resolve the conflict between the circuits about the standards and timing of Rule 23(d)(2) claim forms.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari be granted.

August, 1984

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 83-1930

NANCY FREEDMAN, et al.,

Plaintiffs-Appellants,

v.

AIR LINE STEWARDS & STEWARDESSES ASSOC., LOCAL 550, TWU, AFL-CIO & TRANS WORLD AIRLINES, INC.,

Defendants-Appellees,

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Intervenor-Appellee.

No. 83-1931

MARY ELLEN GILES, et al.,

Plaintiffs-Appellants,

v.

TRANS WORLD AIRLINES, INC.,

Defendant-Appellee,

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Intervenor-Appellee.

(Caption continued on following page)

Nos. 83-1930, 83-1931, & 83-1932

No. 83-1932

AIR LINE STEWARDS & STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, et al.,

Plaintiffs,

and

CAROL HOLMES, et al.,

Plaintiffs-Intervenors-Appellants,

v.

TRANS WORLD AIRLINES, INC.,

Defendant-Appellee,

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Intervenor-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 70 C 2071 & 74 C 2063—Stanley J. Roszkowski, *Judge.*

ARGUED JANUARY 20, 1984—DECIDED MARCH 27, 1984

Before CUMMINGS, *Chief Judge,* CUDAHY, *Circuit Judge,* and FAIRCHILD, *Senior Circuit Judge.*

CUDAHY, *Circuit Judge.* The plaintiffs-appellants here are former Trans World Airlines, Inc. ("TWA") stewardesses whose employment was terminated due to TWA's former "no motherhood" policy for female flight attendants. They are appealing from a decision of the district court refusing to amend a consent decree entered pursuant to a settlement agreement which resolved a suit based on the plaintiffs' claim of sex discrimination against TWA. We affirm the order of the district court.

Nos. 83-1930, 83-1931, & 83-1932

I

Procedural Background

In 1970, the Air Line Stewards and Stewardesses Association ("ALSSA"), then the collective bargaining agent of TWA flight attendants, brought a class action suit against TWA alleging that TWA practiced unlawful sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1970).[1] This alleged discrimination consisted of TWA's policy of grounding all female flight cabin attendants who became mothers while permitting their male counterparts who became fathers to continue flying. TWA agreed to end the policy prospectively and the parties reached a tentative settlement which was approved by the district court. This court, however, found that ALSSA was an inadequate class representative because of conflicting interests of the former and current flight attendants, both of whom were represented by ALSSA. We therefore remanded the case to the district court for appointment of new class representatives. *Air Line Stewards and Stewardesses Association v. American Airlines, Inc.*, 490 F.2d 636 (7th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974).

Upon remand, TWA amended its answer to assert that the claims of most class members (approximately 92% of the class) were barred because they had failed to file charges with the Equal Employment Opportunity Commission ("EEOC") within the statutory time limit.[2] The district court stated that the Title VII filing requirements

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[1] For a full discussion of the procedural background of this case, *see Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982).

[2] The statute required that an employee file a discrimination claim with the EEOC within 90 days of the alleged unlawful employment practice. 42 U.S.C. § 2000e-5(d) (1970). The time limit was extended to 180 days in 1972. 42 U.S.C. § 2000e-5(e) (Supp. II 1972).

were jurisdictional but denied TWA's motion to exclude the affected class members on the ground that TWA's violation continued against all class members until TWA changed its challenged policy. The district court subsequently granted plaintiffs' summary judgment motion on the issue of TWA's liability for violating Title VII. On appeal, this circuit affirmed the grant of summary judgment but held that timely filing of EEOC claims was a jurisdictional prerequisite which TWA could not waive, declined to adopt the continuing violation approach and so found that approximately 92% of the plaintiff class was jurisdictionally barred.[3] *In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F.2d 1142 (7th Cir. 1978). This circuit stayed issuance of its mandate while plaintiffs filed petitions for certiorari with the Supreme Court, but the Supreme Court stayed its consideration of the issues pending outcome of settlement proceedings in the district court.

The parties thus entered into a settlement agreement before the Supreme Court considered the merits of the issues. The most relevant provisions of the agreement concern the award of retroactive seniority. All members of the plaintiff class who returned to work were given full company and union competitive seniority. The agreement provided:

> A. Each re-employed class member shall be credited with the amount of company seniority and length of service to which she was entitled at the date on which her employment was terminated plus company

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[3] Those stewardesses (approximately 30 women) who were terminated on or after March 2, 1970, and those who had previously accepted ground duty positions and so were in a continuing employment relationship with TWA were not considered barred. Approximately 400 other women fell into the class whose claims were considered barred. The first group, whose claims were not barred, was later designated by the district court as Subclass A and the second group as Subclass B.

> seniority and such length of service for the entire compensation period, except for those periods of time during which she was disabled from working by reason of pregnancy or otherwise. . . .
>
> B. It is agreed that the total amount of seniority and credit for length of service (both accrued and retroactive) for the compensation period will be determined by the Court in its discretion, pursuant to . . . all . . . applicable provisions of law, without consent or objection by TWA. . . .

Appellants' Appendix at 6a-7a; 24.

While TWA was barred, under the terms of the Settlement Agreement, from objecting to the district court's determination of the amount of seniority to be awarded, the Independent Federation of Flight Attendants ("IFFA"), which had replaced ALSSA as the collective bargaining agent for the incumbent flight attendants, was permitted to intervene and to object to the settlement terms. The district court, however, rejected IFFA's claim that the court did not have jurisdiction to enter an order regarding the class members whose claims had previously been barred (Subclass B, *supra* n.3) because this circuit had not issued its mandate in the previous appeal with respect to the jurisdictional issue. The district court subsequently approved the Settlement Agreement, found that "full restoration of retroactive seniority would not have an unusual adverse impact upon currently employed flight attendants in any way atypical of Title VII cases," and awarded credit for seniority for the full "compensation period"[4] for the entire plaintiff class. District Court Order Awarding Seniority, entered November 8, 1979, Appellants' Appendix at 30.

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[4] The "compensation period" was defined as "the period of time which commenced upon the termination of a class member's employment and ends on the date on which the Settlement Agreement is signed by TWA. . . ." Appellants' Appendix at 2. TWA signed the agreement on June 18, 1979.

IFFA appealed this decision of the district court on the ground that the court lacked jurisdiction to approve a settlement with respect to Subclass B of the plaintiff class (consisting of those plaintiffs whose claims had been held to be barred because of untimely filing with the EEOC, *supra* n.3). This court, however, held that the district court had jurisdiction to enter an order regarding the settlement, relying on the policy favoring settlement of class action lawsuits, and affirmed the award of seniority. *Airline Stewards and Stewardesses Association v. Trans World Airlines, Inc.*, 630 F.2d 1164, 1169 (7th Cir. 1980).

Upon IFFA's appeal to the Supreme Court, the Court, in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), held that the timely filing of a discrimination charge "with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling," *id.* at 393,[5] thus reversing our decision in *In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F.2d 1142 (7th Cir. 1978). The district court thus clearly had jurisdiction to award relief to all members of the plaintiff class. The Supreme Court also rejected various other claims of IFFA and dismissed TWA's petition for certiorari on this circuit's affirmance of the summary judgment granted for plaintiffs on the issue of TWA's liability for discrimination.

Following the decision in *Zipes*, the plaintiff class filed several motions in the district court, two of which form

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[5] At the time the district court permitted TWA to amend its answer to assert that the members of Subclass B were barred by failure to file charges timely with the EEOC, the court noted that TWA might have waived its defense of statutory time limitation by its delay in pleading the defense. Thus, while the Supreme Court's holding in *Zipes* does not entirely settle the issue of the validity of the claims of Subclass B members, the district court's observation concerning TWA's possible waiver of this defense indicates that perhaps none of the claims of any class members was barred.

the basis for this current appeal. One of these, the "Motion for Modification of Order Awarding Seniority," filed on August 31, 1982, requested that the court change the amount of competitive seniority awarded to those class members who returned to work. Appellants' Appendix at 37-40. The second motion, "Motion to Enforce Certain Terms of the Settlement Agreement," filed October 5, 1982, requested that the district court permit class members who had originally opted not to return to work to change their minds and seek reinstatement. Appellants' Appendix at 61-68. Both motions were opposed by TWA and by IFFA.[6] In an order dated April 21, 1983, the district court denied both these requests with respect to the consent decree enforcing the Settlement Agreement. Appellants' Brief, Short Appendix at 1-15. Three notices of appeal were filed by various members of the plaintiff class, both individually and on behalf of the class, and the three appeals have now been consolidated.

II

Seniority

Both the Settlement Agreement and the district court order awarding back seniority define the amount of competitive seniority to which each returning class member is entitled in terms of the "compensation period." The "compensation period" is clearly defined in the Settlement Agreement as the period between the date when each member's employment was terminated and the date when TWA signed the Settlement Agreement. This date was June 18, 1979. However, because of the intervention by IFFA, the Settlement Agreement did not become final

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[6] The district court noted that TWA's standing to object to seniority issues was "somewhat unclear" under the terms of the Settlement Agreement. The court did not decide this issue, however, because the arguments raised by TWA and by IFFA are substantially the same. Appellants' Brief, Short Appendix at 11 n.3.

until April 19, 1982, and the stewardesses did not begin to return to work until during the following year—three to four years after the Settlement Agreement was reached.

The plaintiffs-appellants' request for modification of the order entering the Settlement Agreement centers on their contention that they should be awarded competitive seniority for the full period from their original discharge up to the time of reinstatement.[7] Appellants' argument is based on two theses: first, that the change of circumstances occasioned both by the Supreme Court's ruling in *Zipes* and by the delay caused by IFFA's intervention necessitates a modification; second, that the district court had a duty to grant full retroactive seniority because, following the *Zipes* decision, it was required to provide a "make whole" remedy under Title VII.

Appellants are correct in stating that Title VII envisioned a "make whole" remedy designed to ensure total eradication of employment discrimination and that the award of full back seniority is often required in order to accomplish this goal. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 762-70 (1976). Appellants are also correct in asserting that a decree entered by a court—whether the result of litigation or of a settlement agreement—is subject to subsequent modification in the proper circumstances even if the power to modify has not been specifically reserved in the decree. *United States v. Swift & Co.*, 286 U.S. 106 (1932).[8]

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[7] Competitive seniority is of great significance to flight attendants because it determines the hierarchy among employees for purposes of domicile choice, bidding for flight assignments, schedule (or line) holder status and protection against furlough and displacement. For a fuller discussion, *see Romasanta v. United Air Lines, Inc.*, 717 F.2d 1140, 1144-45 (7th Cir. 1983).

[8] Appellees TWA and IFFA argue that the Settlement Agreement is merely a contract governed by principles of local law generally applicable to contracts. *Air Line Stewards and Stewardesses Association, Local 550, TWU, AFL-CIO v. Trans*

(Footnote continued on following page)

In *Swift*, the Supreme Court articulated the standard to be applied in determining when modification of a judicial decree is permitted. There, the defendants, who had entered into a consent decree following antitrust proceedings brought by the United States, subsequently sought modification of that decree. The Court stated:

> No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.

Id. at 119. An example of an unforeseen change of conditions necessitating modification of a decree is provided in *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961), in which the Supreme Court held that a consent decree prohibiting a railroad and certain unions from discriminating against nonunion employees should be modified after the Railway Labor Act was amended. *See also Boston Chapter, NAACP v. Beecher*, 679 F.2d 965, 971-73 (1st Cir. 1982) (massive layoffs of recently hired police and firefighters with large proportion of minorities

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[8] *continued*

World Airlines, Inc., 713 F.2d 319, 321 (7th Cir. 1983). The equitable remedies of reformation and rescission are usually available only when mistake, misrepresentation, duress and undue influence are present, but these remedies may also be available in cases of extreme and unforeseeable change of circumstances. RESTATEMENT (SECOND) OF CONTRACTS, chs. 6, 7 and 11, §§ 151-77 and 261-72 (1981). We do not need to make a definitive determination whether the order enforcing the Settlement Agreement should be characterized as a contract or as a judicial decree because, in the absence of mistake, misrepresentation, duress and undue influence (which appellants do not allege), the standards for modification are essentially the same in both circumstances.

caused by unforeseeable enactment of severe budget restrictions necessitated modification of consent decree), *vacated for consideration of mootness*, 103 S. Ct. 2076 (1983). *Cf. Fox v. United States Department of Housing and Urban Development*, 680 F.2d 315, 322-24 (3d Cir. 1982) (frustration of plaintiffs' expectations by changes in mortgage market not sufficiently extraordinary to require change in consent decree).[9]

Appellants must therefore demonstrate that the changes in circumstances, which they argue justify a modification of the court's order, were both unforeseeable and extraordinary and imposed a significantly heavier burden on them. The changes in circumstances, however, were not unforeseeable. Although the Settlement Agreement prohibited TWA from contesting the terms of the court order, IFFA was not mentioned in this prohibition. That IFFA might object would have been predictable both because the agreement was patently adverse to the interests of current employees represented by IFFA and because this circuit's prior decision that incumbent and former employees should be separately represented clear-

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[9] Appellants also cite *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968), for the proposition that, if the original decree does not prove adequate to remedy the harm as intended, then the district court has the power to modify the decree subsequently in order to accomplish its purpose. *Id.* at 248-52. We, of course, do not disagree with the assertion that the district court has such authority. However, we do not agree that the district court has committed error by declining to exercise its authority in this case. The grant of additional back seniority to the appellants will primarily harm the incumbent employees. TWA is thus primarily a neutral bystander at this point in the litigation. It is therefore unclear how the award of additional seniority, under these particular circumstances, is necessary to further the goal of righting the wrong for which TWA was presumably responsible. In addition, the disadvantage to the appellants is not sufficiently egregious to require modification of the decree.

ly indicated the inimical interests of the two groups. Further, some delay between TWA's signing of the agreement and the reinstatement of former employees was anticipated, even though the delay may have been longer than expected. Thus, although the greater delay imposed a heavier burden (by delaying the time of reinstatement and thus the accumulation of additional seniority), this burden cannot be said to be excessively harsh or to frustrate the entire purpose of the settlement.

Finally, the Supreme Court's decision in *Zipes* did not represent an unforeseeable change of law comparable to the legislative enactments of *System Federation* and *Boston Chapter, NAACP.* The chances of the outcome of litigation before the Supreme Court represented precisely the calculated risks which both parties took in deciding to terminate the suit through settlement. That one party in hindsight would have been better off in pursuing its remedies through litigation does not now justify a modification of the terms of that settlement. Such a modification at this juncture and under these circumstances would also significantly undermine the judicial policy of encouraging settlements. As this court stated in proceedings approving another settlement entered into earlier in this course of litigation, when the EEOC attempted to intervene arguing that the settling plaintiffs would have received greater relief by litigating, ". . . the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation. This is especially true within the confines of Title VII where 'there is great emphasis * * * on private settlement and the elimination of unfair practices without litigation.'" *Air Lines Stewards and Stewardesses Association, Local 550 v. American Airlines, Inc.*, 455 F.2d 101, 109 (7th Cir. 1972) (quoting *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 498 (5th Cir. 1968)). Because the change of circumstance was neither unforeseeable nor so exceptional as to satisfy the standard for modification of a decree, we therefore affirm the district court's refusal to award additional back seniority to the appellants.

III

Change of Mind

Appellants also requested that the district court permit certain former employees who, at the time of the settlement in 1979, indicated that they did not wish to return to work to change their minds now and seek reinstatement. Class members who wished to return to work were required to file a claim form by December 2, 1979, which included questions concerning their former employment by TWA. In addition, in a question *not* specified in the Settlement Agreement as being required to be included on the claim form, the former stewardesses were asked whether they sought re-employment with TWA. The district court interpreted a failure to respond affirmatively to this question as a binding decision not to seek re-employment "because a prerequisite to eligibility is the *timely* filing of a reemployment application." Appellants' Brief, Short Appendix at 8 (Order of April 21, 1983) (emphasis in original).

Appellants argue that the Settlement Agreement in fact only required all stewardesses who opted for re-employment to complete the claim form. Virtually all class members did complete the claim form, regardless of their indicated decision as to whether to seek re-employment, because the claim form was also the means by which those who did not wish re-employment could obtain alternative benefits from TWA. Appellants, in turn, rely on another provision in the Settlement Agreement which states:

> TWA will have no obligation to retrain or re-employ any class member following the end of such one (1) year period [after the Final Order Date] if such class member has either not qualified for such retraining or re-employment, has elected not to participate in such retraining or has elected not to accept such reemployment during such one (1) year period.

Appellants' Appendix at 8.

The construction of a consent decree should be treated like that of a contract, and the purpose of the court in construing such a decree should be to discern the intent of the parties in entering into such an agreement. *Sportmart, Inc. v. Wolverine World Wide, Inc.*, 601 F.2d 313, 316-17 (7th Cir. 1979). *See also United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971); *White v. Roughton*, 689 F.2d 118, 119-20 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 1524 (1983). In order to accomplish this, the construing court may look not only to the decree itself but to the circumstances surrounding the negotiation and formation of the Settlement Agreement. *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975).

Appellants' reliance on the passage of the Settlement Agreement quoted above appears misplaced because the passage seems intended to impose an additional requirement on a returning employee to accept re-employment within a year after the final order date. Such re-employment would only come after the prospective returnee has satisfactorily completed TWA's retraining course. It would not make sense within the framework of the agreement for an employee wishing to return to wait until the end (or almost the end) of that period to signify her desire to return because TWA's obligation to offer retraining courses expires at the end of that year. In addition, this passage taken as a whole imposes a series of additional prerequisites including willingness to undertake retraining and successful completion of the retraining course, all of which must logically come after the employee had indicated her desire to return to work.

The Settlement Agreement, however, does not state explicitly anywhere that there is a time limit on or before which a class member must indicate her desire to be re-employed, although completion of the claim form by December 2, 1979, was a clear prerequisite. Nonetheless, by examing the terms of the agreement more fully we conclude that the agreement, by repeatedly referring to the claim form as a "re-employment application," did con-

template that all class members desiring reinstatement would be required to complete the form in a manner reflecting that desire. To contend that a class member must complete the form in order to obtain her rights but to say then that the manner in which the form is completed is irrelevant or waivable would seem to undermine the framework for obtaining remedies established in the agreement.

Finally, we also note that the number of employees seeking reinstatement as determined from these 1979 claim forms was relied on by both the district court and this court in determining that the award of back seniority would not have an unusual adverse impact on the incumbent flight attendants. *Airline Steward and Stewardesses Association, Local 550 v. Trans World Airlines, Inc.*, 630 F.2d 1164, 1169 (7th Cir. 1980). Appellants now assert that the number of employees who now wish to change their minds in order to return is smaller than the number who now no longer desire re-employment but had indicated in 1979 that they would seek re-employment. There is therefore a net "loss" of returnees, although appellees contend that this conclusion is incorrect because additional class members have been identified since 1979, thereby increasing the number of returnees. In any event, the significance of these representations by the plaintiff-class attorneys to the district court and to this court lies in these courts' reliance on the figures derived from the claim forms. The only seemingly logical construction to be given to the courts' and to the parties' own interpretation of the Settlement Agreement is that the claim forms were intended to double as re-employment applications. Further, the filing of such a form clearly indicating a decision against reinstatement would be binding on those class members who chose that option.

Appellants argue, in the alternative, that even if the agreement did require class members to indicate their intention to seek reinstatement by December 2, 1979, these provisions should now be modified because of changed circumstances. For the reasons previously stated in Part

Nos. 83-1930, 83-1931, & 83-1932

II, we must also reject this contention. The order of the district court is therefore affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 27, 1984

Before

Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Senior Circuit Judge*

No. 83-1930

NANCY FREEDMAN, et al.,
Plaintiffs-Appellants,

vs.

AIR LINE STEWARDS & STEWARDESSES ASSOC., LOCAL 550, TWU, AFL-CIO & TRANS WORLD AIRLINES, INC.,
Defendants-Appellees
INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Intervenor-Appellee.

No. 83-1931

MARY ELLEN GILES, et al.,
Plaintiffs-Appellants,

vs.

TRANS WORLD AIRLINES, INC.,
Defendant-Appellee
INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Intervenor-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

Nos. 70 C 2071, 74 C 2063

Stanley J. Roszkowski
Judge

(Caption continued on following page)

No. 83-1932

AIR LINE STEWARDS & STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, et al.,
Plaintiffs,

AND

CAROL HOLMES, et al.,
Plaintiffs-Intervenors-Appellants,

vs.

TRANS WORLD AIRLINES, INC.,
Defendant-Appellee

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Intervenor-Appellee

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

Nos. 70 C 2071, 74 C 2063

Stanley J. Roszkowski
Judge

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

May 9, 1984

Before

Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Senior Circuit Judge*

NANCY FREEDMAN, et al.,

Plaintiffs-Appellants,

No. 83-1930 *vs.*

AIR LINE STEWARDS & STEWARDESSES ASSOC., LOCAL, 550, TWU, AFL-CIO & TRANS WORLD AIRLINES, INC.,

Defendants-Appellees,

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Intervenor-Appellee.

No. 83-1931

MARY ELLEN GILES, et al.,

Plaintiffs-Appellants,

vs.

TRANS WORLD AIRLINES, INC.,

Defendant-Appellee,

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Intervenor-Appellee.

(Caption continued on next page)

No. 83-1932

AIR LINE STEWARDS & STEWARDESSES ASSOC., LOCAL 550, TWU, AFL-CIO, et al.,

Plaintiffs,

and

CAROL HOLMES, et al.,

Plaintiffs-Intervenors-Appellants,

vs.

TRANS WORLD AIRLINES, INC.,

Defendant-Appellee,

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Intervenor-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 70 C 2071 & 74 C 2063—**Stanley J. Roszkowski,** *Judge*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by attorney for appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, et al.,
Plaintiffs,
vs.
TRANS WORLD AIRLINES, INC.,
Defendant.
No. 70 C 2071

ANNE B. ZIPES, et al.,
Plaintiffs,
vs.
AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, and TRANS WORLD AIRLINES, INC.,
Defendants.
No. 74 C 2063

[Filed April 23, 1983]

ORDER

Before the court are various pending motions. The court will address each in turn.

IFFA's MOTION TO COMPEL

IFFA moves to compel plaintiffs to answer IFFA's second set of interrogatories. The interrogatories ask counsel for plaintiffs to specifically delineate the amount of time spent on the related *American Airlines* case, as well as the amounts and sources of compensation received for that work.

IFFA contends the reasonableness of the time spent and the fees sought by plaintiffs in this action can be judged in part by: 1) comparing them to the fees charged in the *American Airlines* case and 2) evaluating the reasonableness of the time spent in light of the hours already expended on parallel or sometimes identical legal issues.

The plaintiffs object to the interrogatories as irrelevant and burdensome. Plaintiffs argue that the fees sought against the Union relate to work which first began in 1979, one year after the fee award in *American Airlines.*

Because the information sought would be only marginally, relevant if at all, and would be very burdensome for the plaintiffs to produce, the court denies the motion to compel.

MOTION FOR DECLARATORY RELIEF

The plaintiffs have moved for a declaration that Bernadette Brockman Scott Montemurro ("Montemurro") and Elizabeth Pehanic Ahlers ("Ahlers") are to be afforded reemployment and adjusted seniority benefits. For the reason stated herein, the motion is granted.

In December of 1979, the plaintiff class filed a "Motion to Determine Class Membership." In that motion, the plaintiff class submitted to the court a list of person who comprised all of the potential class members known to them at the time. Included on the list were Montemurro and Ahlers.[1]

In response to the motion, the court set January 16, 1980 as the cut-off date "to file objections, if any, to plaintiff's motion to determine class membership." *See* Minute Order 12/19/79.[2]

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[1] Montemurro and Ahlers also filed timely claim forms.

[2] The original December 19, 1979 minute order contained a typographical error. The order set January 14, 1979 as the cut-off date. A later minute order corrected the date, changing the 14th to the 16th and changing 1979 to 1980.

The cut-off date was then extended to March 12, 1980. Within the time period set, TWA challenged certain individuals' rights to class membership. *(See e.g.* Judith Jacobson, Transcript of Hearing before Judge McGarr on February 11, 1980, at p. 51-52). TWA also challenged the right of certain class members to be re-employed. *(See e.g.* Laura Shine, *Id.* at 52). During these proceedings, TWA never objected to Montemurro's or Ahler's re-employment rights.

On July 27, 1982, TWA informed class counsel that Montemurro and Ahlers were not entitled to re-employment because they had been terminated for cause. The documents allegedly supporting termination for cause were in TWA's possession as far back as 1973 and 1974.

The plaintiff class claims that TWA has waived their right to raise these objections by failing to raise them within the time period set.

TWA, in response, claims that the January 16, 1980 deadline applied only to objections to class membership and was not related to TWA's right to challenge admitted class members' rights to re-employment. TWA points to Section VI of the Settlement Agreement, which provides that re-employment will not be available to those class members who were terminated for cause:

> . . . no class member shall be eligible for re-employment who has been re-employed after June 1, 1972 and who has been terminated for cause or who has resigned under circumstances which do not entitle her to be re-employed.

TWA argues that Ahlers resigned for medical reasons and Montemurro resigned for personal reasons.

The intent of the court and the parties was that all objections to class membership *and re-employment* be raised by January 16, 1980. TWA's own conduct demonstrates this. Within the cut-off period, TWA raised objections both to class membership generally and to class members' rights to re-

employment (*e.g.* Laura Shine). Furthermore, even if the deadline were construed in accordance with TWA's wishes, equitable considerations such as laches would also bar objections. TWA had the relevant information as early as 1973-74.

For these reasons the court finds that TWA has waived its objections to Montemurro and Ahlers. Montemurro and Ahlers are therefore entitled to re-employment and adjusted seniority benefits.

MOTION TO ENFORCE CERTAIN TERMS OF THE SETTLEMENT AGREEMENT

Plaintiff's motion requests the court to order TWA to re-employ certain class members who three years ago indicated in writing their preference for trip-passes rather than re-employment. TWA and the IFFA oppose the motion and argue that the individuals choosing trip passes made a binding election, thereby losing any right to re-employment. Because the court finds that the election made in 1979 is binding, the plaintiffs' motion is denied.

TWA's duty to re-employ class members is outlined in Section III-A of the Agreement:

> TWA will re-employ as hostesses all class members who are ready, willing and qualified (as defined in Sections VI and IX) to perform the duties required in such re-employment.

Section VI states that TWA will provide retraining classes to facilitate re-employment. The last class was to commence before the expiration of one year "following the Final Order Date." That is, one year after April 19, 1982 or April 19, 1983. The next sentence states that TWA will have no obligation to retrain or re-employ a class member after the end of that period if the class member has not qualified for retraining "or has elected not to accept such re-employment during such one-year period."

Plaintiffs contend that this language obligates TWA to re-employ all those who elect to accept re-employment during the one year period. The other, more specific provisions of Section VI which are also applicable, however, suggest otherwise.

Section VI of the Settlement Agreement is entitled "Eligibility for Re-employment." It states that

> A class member shall be eligible for re-employment if she fulfills TWA's physical requirements (reasonably applied), medical examination, completion of retraining, *and timely files the following described Re-Employment Application.*

(Emphasis supplied).

The description of the Re-Employment Application follows in the next paragraph, indicating among other requirements that those desiring re-employment so indicate in writing on the Re-Application Form. The full paragraph provides:

> Each class member who desired re-employment shall in writing so indicate by providing the following information on a Re-Employment Application form to be prepared and distributed by plaintiffs' attorneys:
>
> A. Current full name, name as of termination, social security number, and former TWA employee number.
>
> B. Home address and mailing address, including zip code.
>
> C. The last TWA base at which she was employed.
>
> D. Approximate date on which she was last employed by TWA.
>
> E. Preferences concerning location of new home base.
>
> F. The inclusive dates of each full-term and partial-term pregnancy and all other periods of disability.
>
> G. Financial information necessary for the calculation described in Section IV.

Pursuant to this provision, plaintiffs' counsel prepared and mailed to class members a document entitled "Claim Form For

Re-Employment." The form specifically askes "Do you desire re-employment as a TWA hostess?" Next to the questions are boxes to be checked Yes or No.

The Agreement, in one of the closing paragraphs of Section VI, sets a time period for the submission of the application form.

> No class member shall be entitled to re-employment under this agreement unless she completes and returns the aforesaid form to the attorneys for the plaintiffs within sixty (60) days after the date of the commencment of the hearing in Section X.

The hearing described in Section X was the hearing on settlement approval, which commenced on October 3, 1979. Consequently, under the terms of the Agreement, the Re-employment Application was required to be filed by December 2, 1979.

Instead of indicating in writing a preference for re-employment, the class members who now seek re-employment checked the "no" box. This meant that the class members would be entitled to 12 TWA Trip passes per Section VII of the Agreement.

The plain and specific terms of the Agreement require class members to indicate in writing their preference for re-employment prior to December 2, 1979. Failure to do so renders the class member ineligible for re-employment because a prerequisite to eligibility is the *timely* filing of the re-employment application. Having elected trip passes and having failed to express a desire for re-employment within the sixty day period of Section VI, these class members now have no right to re-employment. Their election became binding on December 2, 1979. For this reason, the motion is denied.

MOTION TO ADD CLASS MEMBERS AND TO AFFORD BENEFITS TO RECENTLY LOCATED CLASS MEMBERS

Plaintiffs bring this motion on behalf of seventeen women who claim to be class members. In the course of reviewing and briefing the motion, the parties have been able to agree on the majority of questions posed by the motion.

The parties agree that 10 of the 17 women are entitled to class membership. In accordance with the parties' stipulation, the court declares that the following ten claimants are hereby included on the class list and shall receive all of the rights and benefits due class members under the Settlement Agreement:

Linda G. Platt
Zella M. Ochs
Lois Kay Heany
Judith Graggero
Carol Elliott
Renee M. Cigich
Bette M. Williams
Karen Rose Davis
Jeanette Owens
Margaret Bryans

The parties also agree that three of the seventeen women, Marsha Seifer Kelly, Joyce Doyle and Susan G. Dancer, need to submit additional materials before the court may consider their individual cases. The court therefore requires these three potential class members: (1) to submit an affidavit stating whether or not they received a letter from TWA notifying them of the change in the "no motherhood" policy and (2) if they received such a letter and failed to act, to offer an explanation.

The plaintiffs have also agreed to withdraw, without prejudice, the name of Ingrid Langner Abraham pending further investigation of the circumstances surrounding her case.

The three remaining individuals, Lois P. Underwood, Joyce A. Duchon, and Joanna Mueller, are the subject of dispute. TWA contends it needs additional time to investigate the claims of Underwood and Mueller. TWA also contests Duchon's claim to class membership, arguing that a ninety day personal leave of absence taken on April 30, 1969 has the effect of placing Ms. Duchon outside of the class.

As to these last three individuals, the court will hear short oral arguments on May 11, 1983 at 9:00 a.m. TWA will have investigated the facts concerning Mueller and Underwood by this time. The oral argument will also afford TWA an opportunity to more fully explain its position on Ms. Duchon. And assuming that additional affidavits have been submitted by Ms. Kelly, Ms. Doyle and Ms. Dancer, their cases will also be taken up at the hearing.

INTERVENOR'S CROSS APPLICATION FOR INJUNCTIVE RELIEF

The court stays its consideration of this motion until the Seventh Circuit rules on the pending appeal concerning whether TWA must re-employ class members within a fixed period of time.

PLAINTIFF'S MOTION FOR MODIFICATION OF ORDER AWARDING SENIORITY

On November 8, 1979, the court awarded retroactive union seniority to each class member who was then employed by TWA as a flight attendant or who thereafter became rehired by TWA under the Settlement Agreement. The seniority awarded included credit for competitive seniority up to June 18, 1979.

In the order awarding seniority, the court found that "*full restoration* of retroactive seniority will not have an unusual

adverse impact upon currently employed flight attendants." The order provided that each class member

> . . . shall be credited with the amount of union (occupational) seniority to which she was entitled on the date on which her employment was terminated, *plus credit for such seniority for the "compensation period," as defined in the Settlement Agreement.*

Order Awarding Seniority, November 8, 1979 (emphasis supplied).

Since the order was entered, three years of appeals have intervened.

The plaintiffs now ask the court to provide each class member an additional amount of seniority from November 8, 1979 forward to the time the class member is actually rehired by TWA. The plaintiffs argue that this additional award is consistent with the courts intent to award "full restoration of retroactive seniority, *Id.*, and further is consistent with the "make whole" objective of Title VII.

The Union and TWA[3] argue that entry of such an award would be inconsistent with the specific terms of the Settlement Agreement. After examining the terms of the agreement, the court denies the plaintiffs' motion.

Both the Settlement Agreement and the order awarding seniority tie the amount of seniority to be awarded to the "compensation period." Section V of the Settlement Agreement states:

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[3] TWA's standing to object to seniority issues is somewhat unclear given the amendment to the Settlement Agreement which provides that the court will determine seniority issues "without contest or objection by TWA." The court need not decide this issue, however, because the Union, which definitely has standing and has objected to the motion, raises arguments similar to those made by TWA. To the extent TWA is held to be barred from raising seniority objections, the court will view the objection as the Union's alone.

> Each re-remployed class member shall be credited with the amount of company seniority and length of service to which she was entitled at the date on which her employment was terminated *plus company seniority and such length of service for the entire compensation period.*

The court's November 8, 1979 Seniority Award also employed similar language.

The Settlement Agreement defines "compensation period" as

> . . . the period of time which commenced upon the termination of a class member's employment *and ends on the date on which this Settlement Agreement is signed by TWA.*

TWA signed the Agreement on June 18, 1979.

Thus, the compensation period ended on that date of signing and the court's original award of seniority up to June 18, 1979 was in accordance with these settlement term provisions.

Given the specific terms which limit seniority to the compensation period, the award plaintiffs request is simply beyond the terms of the Settlement Agreement.

In response to the precise terms of the Agreement, plaintiffs tacitly admit that the Agreement does not allow the award they now seek. Plaintiffs, in their reply brief, argue that the "[c]court's authority to award seniority arose out of the Civil Rights Act, not the Settlement Agreement." Plaintiff's Reply Memorandum at 1.

The plaintiff's, however, lose sight of the fact that this litigation was comprised through the Settlement Agreement and there has been no finding that TWA has violated the Civil Rights Act. The Settlement Agreement provides that "the execution of this Agreement by TWA is not and shall not be construed as an admission [of] liability." (Section II of the Settlement Agreement). In addition, the Agreement, signed by plaintiffs, recognizes that "TWA will have no monetary or other

obligation to any member of the class or to any representative or attorney of the class unless expressly provided in this Agreement." In light of this language, the court may not and will not fashion additional relief beyond the seniority provided for in the Settlement Agreement. The motion is therefore denied.

MOTION FOR RELIEF REGARDING COMPANY SENIORITY OF CERTAIN PRESENTLY EMPLOYED CLASS MEMBERS

Section III(c) of the Settlement Agreement provides that class members who are already employed at TWA "shall have, be credited with and enjoy the amount of seniority" provided for in the Agreement. TWA credited presently employed class members with the seniority in July of 1982.

The plaintiffs contend that the seniority should have been credited to them approximately two months earlier, on April 19, 1982,[4] the date the Settlement Agreement became final. They contend the failure to properly credit seniority resulted in reduced wages for a period of approximately two months.

TWA contends that a July adjustment date was reasonable under the circumstances and that if the plaintiffs desired

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[4] TWA's argument that the Final Order Date should be viewed as June 1, 1982 is unpersuasive. The Seventh Circuit order dated June 1, 1982 provided:

> Now that the Supreme Court has affirmed our judgment affirming the district court's approval of the settlement, award of seniority, and dismissal of the action, our mandate in Nos. 79-2460 and 79-2465 will issue as of course, and any appropriate proceedings in the district court in implementation and enforcement of the settlement will follow by reason of such affirmance.

The Seventh Circuit's order is merely a directive to this court to conduct any further necessary proceedings. The final order date, upon which the parties became bound, is clearly April 19, 1982, the day the U. S. Supreme Court mandate issued.

seniority adjustments to be retroactively applied to the final order date, they should have negotiated for appropriate language in the Settlement Agreement. TWA also argues that the adjustments requested should be considered *de minimus.*

First, the adjustments requested are not *de minimus.* Although the amount of salary adjustment has not been established and may indeed be small, the adjustment is significant to the class members. Proper and timely credit for seniority is a right class members bargained for and which this court will enforce.

Second, the absence of a provision specifying the date for seniority adjustments means the seniority provisions were to take effect at the same time as the obligations under the additional agreement, i.e., at the final order date. Where the parties desired time beyond the final order date, they provided for it in the Agreement. For example, the time in which TWA must offer retraining classes was set at one year. Since the terms of the Agreement specify additional time in the specific instances where it was deemed necessary, it must be implied that all other obligations begin at the time the settlement became final.

The court therefore grants plaintiffs' motion and instructs TWA to retroactively adjust the presently employed class members' salaries for any wages lost due to the failure to properly credit seniority.

ENTER:

/s/ STANLEY J. ROSZKOWSKI
Stanley J. Roszkowski, *Judge*
United States District Court

Dated: April 21, 1983

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, PAMELA DAILING, SADIE SUE LAKE, PAT SANTINI, VIRGINIA HIRT and BONNIE YODER, *Plaintiffs,* v. TRANS WORLD AIRLINES, INC. *Defendant.*	No. 70 C 2071
ANNE B. ZIPES, FRANCES M. SWIFT, et al. *Plaintiffs,* v. AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO and TRANS WORLD AIRLINES, INC., *Defendants.*	No. 74 C 2063

NOTICE TO CLASS MEMBERS

Pursuant to an Order of the Court, this Notice is being distributed to all persons who have previously been included as class members in these cases.

The purpose of this Notice is to advise you: (1) the provisions of a settlement agreement, (2) of your rights under the settlement agreement, and (3) of a court hearing on the agreement to be held on July 31, 1979, at 10:30 A.M.

HISTORY OF THE LITIGATION

On July 2, 1965, the Civil Rights Act of 1964 (the "Act") went into effect, prohibiting employment discrimination on the basis of sex. On August 18, 1970, a suit was filed alleging that Trans World Airlines, Inc. ("TWA") had violated the Act. The suit was brought on behalf of all hostesses who were fired (or resigned) on account of pregnancy or the adoption of a child. In 1971, a settlement agreement was entered into which was approved by the District Court but that approval was reversed on appeal to the Seventh Circuit Court of Appeals. The Court of Appeals also ordered that the union (Air Line Stewards and Stewardesses Association, Local 550, TWU, AFL-CIO) be removed as the representative of the class. *ALSSA* v. *American Airlines, Inc.*, 490 F.2d 636, (7th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974). When the case resumed in the District Court, Pamela Dailing, Pat Santini and Anne B. Zipes were appointed as the representatives of the class.

In 1972, TWA offered re-employment as hostesses, without retroactive seniority or back pay, to those class members who agreed to waive their rights in this litigation. In 1974, another suit was filed which alleged that TWA's 1972 offer was a violation of the Act.

On October 15, 1976 and October 18, 1976, respectively, two Court Orders were entered which: (a) declared that TWA's aforesaid employment practice had been a violation of the Act and (b) ruled that the class included all hostesses who had been fired after July 2, 1965 on account of motherhood.

TWA appealed to the Seventh Circuit Court of Appeals. In August 1978, the Court of Appeals ruled that the aforesaid employment practice was a violation of the Act but that the only persons who are entitled to membership in the class are those hostesses who either (a) gave birth to children on or after March 2, 1970 or (b) gave birth to children prior to March 2,

1970 and thereafter held ground jobs continuously until March 2, 1970. (582 F.2d 1142). That decision of the Court of Appeals was appealed to the United States Supreme Court by the plaintiffs and TWA by petitions for writs of certiorari. Prior to any decision by the U.S. Supreme Court, this settlement agreement was entered into. The agreement has been signed by TWA, Pamela Dailing, Pat Santini and Anne B. Zipes. It was presented to the District Court on June 26, 1979 at which time it was preliminarily approved by the Court. For purposes of this proposed settlement, the Court divided the class into two sub-classes, *viz.*:

SUB-CLASS A

> All former TWA hostesses whose employments were terminated on account of pregnancy or adoption and whose pregnancies ended (or the adoption occurred) on or after March 2, 1970 or whose pregnancies ended (or the adoption occurred) prior to March 2, 1970 but who were employed thereafter in ground jobs continuously until March 2, 1970;

SUB-CLASS B

> All former TWA hostesses whose employments were terminated on account of pregnancy or adoption and whose pregnancies ended (or the adoption occurred) prior to March 2, 1970 but who were not thereafter employed in ground jobs continuously until March 2, 1970.

Separate attorneys have been appointed to represent the interests of the aforesaid two sub-classes. The attorney for Sub-Class A is Kevin M. Forde, 111 W. Washington Street, Chicago, Illinois, who was appointed by the Court in June 1979 to provide separate representation for Sub-Class A, including the evaluation of the fairness of the settlement to Sub-Class A.

The attorneys for Sub-Class B are Arnold I. Shure, 10 South LaSalle Street, Chicago, Illinois and Pressman & Hartunian, Chtd., 55 East Monroe Street, Chicago, Illinois. Prior to the appointment of Mr. Forde, Mr. Shure and his associates and Pressman & Hartunian represented all of the class members. DO NOT MAKE INQUIRIES BY TELEPHONE TO THE AFORESAID ATTORNEYS OR TO THE COURT; YOU MAY DO SO ONLY IN WRITING.

A hearing will take place on July 31, 1979 at the hour of 10:30 A.M. at the U.S. District Courthouse, 219 South Dearborn Street, Chicago, Illinois in the courtroom of Judge Stanley J. Roszkowski, to determine whether or not the settlement agreement should be finally approved.

THE SETTLEMENT AGREEMENT

The Settlement Agreement is available for inspection by any interested person. It is on file at the office of the Clerk of the U.S. District Court, 219 South Dearborn Street, Chicago, Illinois. The provisions of the settlement agreement are summarized as follows:

RE-EMPLOYMENT OR TRIP PASSES

All members of both sub-classes will be entitled to re-employment as TWA hostesses or, if you so desire, you may receive twelve (12) trip passes instead, the details of which are stated below.

In order to be eligible for re-employment as a hostess, the following requirements must be met by you:

(1) Complete the enclosed Claim Form;

(2) Successfully pass TWA's medical examination;

(3) Successfully meet TWA's physical requirements;

(4) Complete TWA's re-training course.

If you apply for re-employment, you will be notified by TWA of the date and place of the re-training class to which you will be assigned. The re-training classes will be conducted at various times within one year following final approval of the settlement. Base assignment will be made according to seniority. If no vacancy exists at a base of your choice, TWA will assign a base to you.

SENIORITY

Each re-employed class member will be credited with the seniority which accrued as of the time when she was terminated plus retroactive seniority (to the extent allowed by the Court) for such of the time subsequent to termination as the Court allows. The plaintiffs intend to seek full retroactive seniority for the entire period up to June 18, 1979.

Any class member who does not become re-employed as a hostess will receive twelve (12) trip passes, each of which shall be at any time during her lifetime good for a TWA round trip by her, her spouse, or any of her dependent children under 21 and her children under 23 who are full-time students. The passes will be Class 9 (which is the priority for retired hostesses) except that other persons holding Class 9 passes shall have priority.

BACKPAY

TWA will pay $1,500,000 to Sub-Class A (the post-March 1970 group), to be prorated amongst them on the basis of their respective losses of net earnings since termination. There are approximately 30 persons in this sub-class.

TWA will pay an additional $1,500,000 to sub-class B (the pre-March 1970 group) to be prorated amongst them on the basis of their respective losses of net earnings since termination. There are approximately 400 persons in this sub-class.

The prorations will be based on losses and earnings after adjustment for periods of disability and actual earnings since termination. Deductions will be made for Social Security, income tax withholding, and plaintiffs' attorneys' fees and expenses.

Attorneys' fees and expenses will not be determined unless and until the agreement is first approved. The plaintiffs' attorneys intend to seek an award of fees, from the total settlement funds of $3,000,000, in the total amount of up to $1,250,000 plus expenses, to be divided equally between the two Sub-Classes. Their petitions for attorneys' fees will set forth their efforts during seven years of litigation, consisting of in excess of 4,000 hours of lawyer time expended on behalf of all class members. Mr. Forde will file a separate petition for services rendered to Sub-Class A subsequent to June 20, 1979. If the settlement is approved, the Court will make its decision on fees based upon fairness and the applicable standards of law.

The re-employment rights and trip-pass benefits are the same for both sub-classes. The individual members of Sub-Class A will receive much larger amounts than the individual members of Sub-Class B. The decision of the Plaintiffs' attorneys to accept the offer which gives rise to this disparity was due to the Court of Appeals' opinion, which held that the members of Sub-Class A are entitled to relief but that the claims of the members of Sub-Class B are barred on account of no one of them having filed a timely claim with the federal Equal Employment Opportunity Commission.

OBJECTIONS AND COMMENTS

If the settlement is finally approved, both lawsuits will be dismissed. You may appear and be heard, in person or by an attorney, at the hearing on July 31, 1979. You may also file in writing a statement of your objections or comments. This may be done by mail, addressed to:

Clerk of the U.S. District Court
Re: Airlines Stewardess
Litigation, Case No. 70 C 2071
219 South Dearborn Street
Chicago, Illinois 60604

The objection or comment must arrive at the Clerk's office by no later than July 27, 1979.

RETURN OF CLAIM FORMS

IN ORDER TO RECEIVE ANY OF THE BENEFITS OF THE SETTLEMENT, REGARDLESS OF WHETHER OR NOT YOU OBJECT OR HAVE ANY COMMENT, YOU MUST RETURN THE ENCLOSED CLAIM FORM, SIGNED BY YOU AND *NOTARIZED,* MAILED OR DELIVERED TO:

PRESSMAN & HARTUNIAN, CHTD.
55 East Monroe Street
Suite 4005
Chicago, Illinois 60603

The claim forms must be received by Pressman & Hartunian, Chtd. by no later than August 31, 1979.

Clerk of the U.S. District Court
for the Northern District of Illinois,
Eastern Division

No. 84-240

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NANCY FREEDMAN, et al.,

Petitioners,

vs

TRANS WORLD AIRLINES, INC., and
AIR LINE STEWARDS & STEWARDESSES
ASSOCIATION, LOCAL 550, TWU, AFL-CIO,

Respondents.

BRIEF OF RESPONDENT TRANS WORLD AIRLINES, INC. OPPOSING REVIEW

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ASSOCIATION. LOCAL 550. TWU. AFL-CIO.

Respondents.

BRIEF OF RESPONDENT TRANS WORLD AIRLINES. INC. OPPOSING REVIEW

Petitioners seek review of a decision of the United States Court of Appeals for the Seventh Circuit that denied modifications of a 1979 settlement agreement and court order in a class action against TWA. The action. begun in 1970. had alleged that an airline practice of terminating flight attendants on pregnancy violated Title VII of the 1964 Civil Rights Act.[1]

[1] Similar class actions were filed on the same day against American Airlines. Inc. and TWA. Both abandoned the practice in 1970. The litigation continued over the alleged violation of Title VII and remedies of back pay. reinstatement. seniority. etc. The litigation has produced eight court of appeals decisions. several denials of certiorari. and one reported decision of this Court. See *ALSSA* v. *TWA*. 630 F. 2d 1164 (1980). and *Zipes*. cited in the text. and cases there cited.

The settlement was intended to be complete, with the stated purpose of "putting finally to rest all of the claims, issues and questions of fact and law which have or might have been raised."[2] In February 1982 *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, affirmed lower court decisions approving the settlement and awarding reemployed class members competitive seniority up to the date of the agreement, as it provided.

Later in 1982 the petitioners filed motions to extend the competitive seniority period from the date of the agreement to the dates of re-employment of all class members in 1983 and to require re-employment of 14 class members who in 1979 had rejected re-employment under the settlement.[2a] The district court's denial of the motions was affirmed by the court of appeals in March 1984 in the decision sought to be reviewed. *Freedman* v. *Trans World Airlines, Inc.*, 730 F. 2d 509 (Pet. App. 1a).

The petition for certiorari should be denied because, since it is based on factual assertions not supported by the record and on inapplicable legal principles, the claimed conflict with other decisions does not exist.

I

DENIAL OF ADDITIONAL SENIORITY NOT IN CONFLICT WITH OTHER DECISIONS

Petitioners demand modification of the seniority award to give them approximately four more years of competitive seniority in addition to the period, amounting variously from 9 to 14 years, awarded reemployed class members under the settlement

[2] TWA App. 1a.

[2a] TWA App. 18a and 21a.

contract.[3] The court of appeals denied the modification because the delay in reemployment, caused by the settlement approval proceeding, was foreseeable from the provisions of the contract. Petitioners do not dispute this factual holding. Their main argument (pp. 8-10) is that the decision in *Firefighters Local Union No. 1784* v. *Stotts*, ____ U. S. ____, 81 L. Ed. 2d 483 (1984), requires "Title VII standards" to be applied in measuring the district court's power to modify the award of seniority; and that Title VII under *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (1976), required them to be given full retroactive seniority to the dates of reemployment. They also assert that the court of appeals did not apply the standards for modification enunciated in *System Federation* v. *Wright*, 364 U. S. 642 (1980), and other decisions (Pet.9 n.8).

A. Award of Additional Seniority Would be an Extreme Violation of the Settlement Agreement

The four corners of the settlement agreement expressly and clearly negative the claimed modification for awarding additional seniority. The *Stotts* opinions of Justices White and Stevens[4] referred to the "four corners" of a consent decree in determining its application rather than what might have been provided after disputed litigation.

The overall design of the contract relieved TWA of any obligation not expressly stated. In Section III.[5] TWA agreed (A) to pay class members $3 million; (B) to re-employ eligible class members or give them trip passes; and (C) to credit those re-employed with seniority as provided in Section V. Clause D stated that TWA has "no . . . other obligation to any member of the class . . . unless expressly provided in this Agreement."

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[3] The seniority granted under the agreement was for the period from termination during 1965-1970 to the date of execution of the contract, June 18, 1979. See below, p. 4.

[4] Justice White, 81 L. Ed. 2d 496; Justice Stevens, 81 L. Ed. 2d 507.

[5] TWA App. 2a-3a.

The provision for retroactive seniority in Section V was expressly limited by the defined term "compensation period." The definition said that it meant the period which commenced on termination and ended when TWA signed the agreement (June 18, 1979).[6] The compensation period among other things limited the amount of competitive seniority to be determined by the district court under Section V-B, as amended.[7] The district court's award of competitive seniority necessarily followed the agreement by stating that each reemployed class member should be credited with her seniority when terminated "plus credit for such seniority *for the 'compensation period'* as defined in the Settlement Agreement."[8]

Thus, in seeking to modify the seniority award, petitioners are also necessarily seeking to modify the settlement agreement and the order approving the agreement which limited TWA's obligations to those expressly stated. Since the additional years of competitive seniority were not "expressly provided," petitioners' claim is a serious violation of the settlement bargain they made in 1979. Their claim is unfair to TWA and to the district court, the court of appeals, and this Court, which they persuaded to approve the settlement during 1979 to 1982.

B. No Grounds for Modification

1. Decisions Cited by Petitioners Do Not Support Modification

Neither the settlement agreement nor the seniority award provided for the modification of either. The settlement agreement stated that it would be enforceable in the district court "by virtue of the powers of said Court to enforce its orders and judgments, in addition to any other rights and remedies which

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[6] TWA App. 1a, 9a.
[7] TWA App. 10a.
[8] TWA App. 13a.

plaintiffs may have."[9] The order awarding seniority stated that the court retained jurisdiction to enforce the agreement and the order and to adjudicate any disputes concerning its interpretation.[10]

The source of authority to modify as sought by the petitioners must thus be in common law or equity principles as implemented in Rule 60(b) of the Federal Rules of Civil Procedure. This Court in *System Federation* v. *Wright*, 364 U. S. 642, 644 (1961), noted that the motion to modify a consent decree was made under Rule 60(b).

Petitioners in the court of appeals and here treat what they seek to change as a "consent decree." Never before in this litigation was that term used in any of the courts, including this Court in *Zipes* v. *TWA*, which affirmed the settlement approval and the seniority award. The court of appeals in the opinion sought to be reviewed accepted petitioners' "consent decree" nomenclature on the ground that the standards for modification of a settlement contract and a consent decree are essentially the same (Pet. App. 8a, n. 8).[11] That idea can be accepted in opposing reviewability because the petitioners, as the court of appeals held, are unable to meet the limited consent decree standards for modification as stated in many decisions of this Court since *United States* v. *Swift & Co.*, 286 U. S. 106, 119 (1932).

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[9] TWA App. 9a.

[10] TWA App. 13a.

[11] However, there are significant differences. Parties customarily enter into settlement agreements without court approval or knowledge, for court approval is required only in class actions by reason of Rule 23(e). Modification of such a contract is accordingly determined by contract principles of reformation and restitution. *Restatement of the Law, Contracts 2d, chs. 6 and 7, § 151-167.* In contrast, the source of the power to modify a consent decree, which usually contains an injunction, is "the fact that an injunction often requires a continuing" supervision by the issuing court. *System Federation* v. *Wright*, 364 U. S. 642, 674 (1961), quoted in Justice Blackmun's dissent in *Stotts*, 81 L. Ed.2d 519.

The petitioners' claimed factual basis for modification is that the judicial process for approval of the settlement contract and seniority award postponed their re-employment and deprived them of four years of seniority between the time fixed by the agreement for the end of the retroactive seniority period (June 18, 1979) and their re-employment sometime in 1983. The court of appeals held that this delay was foreseeable from the settlement contract so that the petitioners did not make a "showing of grievous wrong evoked by new and unforeseen conditions" under *Swift* and other decisions (Pet. App. 9a-9b).

The court of appeals rightly held that the delay asserted by the petitioners must have been foreseen by them. The settlement contract expressly provided in detail for the eventuality of an appeal from the order approving the settlement. The carrying out of the settlement depended on the "final order date," defined in the agreement as the date when its approval is "no longer subject to review."[12] The litigation over approval of a *1971* settlement agreement had held up the proceeding until this Court denied certiorari in *1974* on a court of appeals' disapproval of the settlement. *ALSSA* v. *American Airlines*, 490 F. 2d 636, cert. den. 416 U. S. 993. Petitioners, at least through their counsel, were fully aware of the probability of several years of delay in re-employment and the seniority period as a result of the provisions in the settlement agreement for its final approval on appeal.[13]

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[12] TWA App. 1a.

[13] Other cases cited by petitioners (p. 9 n 8) on the authority to modify a consent decree do not conflict with the orders sought to be reviewed and are of no relevance. In *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424, 443 (1976), an ambiguous injunction not in a consent decree or settlement affected the future operation of public schools. In *New York State Assoc. for Retarded Children* v. *Carey*, 706 F. 2d 956, 968-71 (2d Cir. 1983), where an injunction had limited the facilities for patients in a state institution, the court indicated that a less rigid standard for modification applied when an injunction involves "the supervision of changing conduct or

(Footnote continued on following page.)

2. Title VII does not Require the Claimed Modification

Petitioners' major contention apparently is that Title VII, regardless of any other principles, entitles them to the modification that would add four additional years of seniority. They argue that a summary judgment that TWA's pregnancy practice violated Title VII supports their contention under such Title VII decisions as *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 777 (1976), *Firefighters* v. *Stotts*, ____ U.S. ____, 81 L. Ed. 2d 483 (1984), and *Romasanta* v. *United Air Lines*, 717 F. 2d 1140, 1156 (7th Cir. 1983). The decisions do not uphold petitioners' contention.

Franks involved, not a settlement, but a contested seniority award which this Court considered on direct appeal from the award. Here the limitation of seniority to the compensation period was a negotiated bargain. The petitioners could have made their claim for additional years of seniority as an objection to the settlement agreement and the seniority award in 1979. Instead they urged approval of the agreement which limited competitive seniority and the district court's authority to award it to the defined compensation period.

Further, after the settlement, the summary judgment of TWA's violation of Title VII became of no significance between TWA and the petitioners. The settlement agreement provided that the action against TWA would be dismissed by the order approving the settlement.[14] Accordingly, the action was dismissed in the order approving the settlement[15] as well as in the

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(Footnote continued from preceding page.)

conditions" (p. 967). In affirming the dissolution of a consent injunction that was based on a single isolated securities act violation years before, the court in *SEC* v. *Warren*, 583 F. 2d 115, 118-20 (3d Cir. 1978) emphasized that the district court would be reversed only on a finding of abuse of discretion.

[14] Sec. X. TWA App. 8a.

[15] TWA App. 11a.

order awarding seniority.[16] The summary judgment was practically voided by the dismissal of the action that had brought about the summary judgment. The remand order of the court of appeals explained that the summary judgment "has no apparent continuing significance independent of the settlement."[17]

The petition overlooks this Court's approval of the settlement in the *Zipes* decision in saying (p. 8) that it "reinstated the district court's decision granting summary judgment to the plaintiff class." The *Zipes* opinion was discussing the union's attack on the seniority award when it said that, with the reversal of the court of appeals' decision in 582 F. 2d 1142 and the dismissal of TWA's certiorari petition to review that decision, the summary judgment order "remains intact and is final."[17a] The finding of a violation was thus held sufficient to award retroactive seniority for the compensation period over the union's objection under *Teamsters* v. *United States*, 431 U. S. 324 (1977). But between TWA and the petitioners, the summary judgment became *functus officio* with the dismissal of the action.

Petitioners overlook significant differences between *Firefighters* v. *Stotts* and this case. The consent decree there did not award competitive seniority and had no provisions for layoffs, as emphasized in the opinion (81 L. Ed. 491, 496). When proposed layoffs because of economic conditions would have bumped black employees of lower seniority, the district court enjoined the layoffs under general provisions of the decree. The controversy in the lower courts and the different views in this Court were produced by the absence of express decree

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[16] TWA App. 13a.

[17] TWA App. 17a.

[17a] 455 U. S. 399: "... the order that found classwide discrimination remains intact and is final. The award of retroactive seniority to members of Subclass B as well as Subclass A is not infirm for want of a finding of a discriminatory employment practice."

provisions and dealt with whether the injunction was justified as an enforcement of the decree, or as a modification of it, or as an application of Title VII.

Here there is no such room for dispute because the settlement agreement and the seniority order expressly and clearly limit seniority to the date of the agreement. Further, the majority holding in *Stotts* was that § 706(g) of Title VII limited the district court's authority to administer the decree and required denial of the seniority claim. Here the petitioners contend that Title VII as applied in *Franks* requires a change in a basic feature of the settlement agreement to award them more years of seniority.

Petitioners evade the real significance of *Romasanta* v. *United Air Lines* when (pp. 9-10) they cite it for a statement that Title VII requires the maximum measure of seniority relief that would not result in unusual adverse impact. *Romasanta* involved a no-marriage rule for flight attendants that had been held to violate Title VII. The district court restored competitive seniority only for the period of actual employment and did not, as in the agreement here, permit seniority for the period from termination to the date of settlement. The court of appeals held that the district judge did not abuse his discretion in holding that the *Franks* principle of "full retroactive seniority" did not require an award of full seniority for the termination period. The Supreme Court denied certiorari in April 1984 (44 CCH S. Ct. Bull. B2083), which the petition does not mention although petitioners' counsel here represented flight attendants there (717 F. 2d at 1142).

The *Romasanta* decision refutes petitioners' contention that, to comply with Title VII standards, the settlement agreement must be modified to give them competitive seniority for the four years before their re-employment in addition to the many preceding years of their termination. *Romasanta* held that even a contested, non-settled denial of all years of retroactive competitive seniority did not violate the *Franks* principle of full seniority under Title VII.

II

DENIAL OF RE-EMPLOYMENT NOT IN CONFLICT WITH DUE PROCESS AND RULE 23 DECISIONS

Fourteen petitioners attack in this Court for the first time the adequacy of a settlement notice and claim form under the Due Process Clause and Rule 23 of the Federal Rules of Civil Procedure. In 1979 they said, in returning the form, that they did not desire re-employment. In October 1982 they moved in the district court for an order directing TWA to re-employ them despite their earlier choice of 12 trip passes in lieu of re-employment.[18] They contended that the settlement agreement and claim form did not make their 1979 choice irrevocable and that equitable principles justified their re-employment. The district court (App. 25a) and the court of appeals (*Id.* 13a-14a) construed the settlement agreement as foreclosing these petitioners' change of mind.

Petitioners in this Court do not continue their contention about the construction of the settlement contract, but contend, as they did not below, that the notice of the settlement and the claim form failed to give them necessary information in violation of due process and the notice requirements of Rule 23. They now allege a violation of the "standards of *Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U. S. 306 (1950)" and attack, again for the first time, the "timing" of the claim form.[19]

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[18] TWA App. 6a.

[19] The newness of petitioners' attack on the claim form is indicated by its presence in the record, not as an exhibit, but only as a partial description in the petitioners' motion in the district court: "A 'Claim Form for Settlement Benefits' was completed by most class members in the summer of 1979. . . . One of the questions asked on the claim form is 'Do you desire re-employment as a TWA hostess'? Next to the question are boxes labeled 'Yes' and 'No'. The class members affected by this motion checked the 'No' box." (TWA App. 21a).

Ordinarily this Court does not give consideration to issues not raised below. *Hormel* v. *Helvering*, 312 U. S. 552, 556 (1940). *Michel* v. *Louisiana*, 350 U. S. 91, 99-101 (1955). *Steagald* v. *United States*, 451 U. S. 204, 208 (1981). Here the petitioners have twice failed to raise the issues they now ask this Court to consider. (1) Those issues were not raised when they sought reemployment in this proceeding as noted. (2) The notice they attack on new grounds in this Court was expressly held adequate by the order[20] approving the settlement in November 1979, which the petitioners then sought and which the court of appeals and this Court affirmed in *Zipes*, 455 U. S. at p. 401. And petitioners' contentions lack merit for further reasons.

A. Notice and Claim Form Not Inadequate

1. Petitioners Not Misinformed

Petitioners seriously misread the record when they say (p. 12) that the notice to class members failed to state that those "who did not opt for reinstatement would irrevocably waive such relief" and was "completely silent about the significance of the question" of whether they desired reemployment. In fact, both the agreement and the notice explained expressly and clearly that class members would be re-employed only if they so indicated in the claim form in 1979.

Section VI of the agreement[21] stated that a class member was eligible for re-employment if she fulfills physical requirements, etc., "and timely files the following described Re-employment Application." The section then said that each class member desiring re-employment "shall in writing so indicate" by providing prescribed information in the application. It then

[20] "The court finds that proper notice of the proposed settlement and the hearings thereon was given to the members of the plaintiff class and Subclasses A and B." TWA App. 11a.

[21] TWA App. 4a-5a.

said that the application form was to be prepared and distributed by plaintiffs' attorneys to whom each class member "desiring re-employment" shall forward the form. Compliance with the time limit as a condition of re-employment was stated in unequivocal language: "*No class member shall be entitled to re-employment . . .* unless she completes and returns the aforesaid form . . . within sixty (60) days." (Emphasis added)

The notice to class members was equally clear and emphatic in informing them that, if they wished to be re-employed, they must make known their choice within a set period in 1979. The notice stated that "to be eligible for re-employment" the class member must meet certain requirements, of which the first was "Complete the enclosed Claim Form" (Pet. App. 35a). The conclusion of the notice (*Id.* 38a) said in capital letters, "TO RECEIVE ANY OF THE BENEFITS OF THE SETTLEMENT . . . YOU MUST RETURN THE ENCLOSED CLAIM FORM." and in a final sentence, "The claim forms must be received by Pressman & Hartunian, Chtd. by no later than August 31, 1979" (*Id.*). The form required the class member to indicate whether she desired employment by marking a "Yes" or "No" box.[22]

There is thus no factual basis for the petitioners' contention that the notice and claim form did not adequately inform them under the due process clause and Rule 23 that they had to choose re-employment in 1979 in order to obtain it under the settlement.

2. No Conflicting Decisions as Claimed by Petitioners

Since there is no factual basis for petitioners' contention that the notice was inadequate, the decisions on inadequate notice claimed by petitioners (pp. 11-12) to conflict with the rulings below are all inapplicable. Those decisions also involved issues significantly different from those here.

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[22] TWA App. 21a.

The class action, due process decision of *Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U. S. 306 (1950), which dealt with the method of giving notice, held inadequate the first notice by newspaper publication of a state court proceeding to common trust fund beneficiaries whose rights would be bindingly adjudicated. Notice by mail was held required for beneficiaries whose addresses were known. Here the notice class members received of a prior settlement in 1971 was held adequate in *ALSSA* v. *American Airlines*, 455 F. 2d 101, 108 (7th Cir. 1972). The petitioners here had been members of the class for years and represented by counsel. The 1979 notice of settlement, given by mail, was held adequate in the settlement approval order, as noted above.[23]

Some of the decisions cited by petitioners involved notices under Rule 23(d)(2) rather than the Rule 23(e) notice given here. Rule 23(d)(2) deals with the notices of various matters, i.e., "of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action" (Pet. App. 3). The notice of the settlement was required by Rule 23(e), stating that "notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs" (*Id.*). *Kyriazi* v. *Western Elec. Co.*, 647 F. 2d 388, 396 (3rd Cir. 1981), which is cited by petitioners (Pet. 11), involved a notice under Rule 23(d)(2) and differentiated one aspect of *Pettway* v. *American Cast Iron Pipe Co.*, 576 F. 2d 1157 (6th Cir. 1978), on the ground that it dealt with a settlement notice under Rule 23(e).

3. Petitioners' Attorneys And Not TWA Would Be Responsible for the Claimed Inadequacy

The notice and claim form which petitioners attack in this Court were prepared by their own attorneys, who had been

[23] TWA App. 11a.

appointed to represent the class members and had represented them for years.[24]

The settlement agreement expressly put the notice and claim forms under the control of their attorneys. Section X stated, "plaintiffs' attorneys will draft all orders, notices and other papers necessary . . . for the implementation of the procedures required under Rule 23, F.R.C.P., *including a proposed form of notice to class members.*"[25] Section VI provided that the re-employment application form should be "prepared and distributed by plaintiffs' attorneys," to whom the form was to be forwarded.[26] These provisions were followed by the statement quoted above that no class member "shall be entitled to re-employment" unless she returned the form to the class members' attorneys within the fixed period.

In attacking the notice and claim form provisions about re-employment, the petitioners are attacking the legal services of their own attorneys. TWA is not responsible for the inadequacy, if any, in the performance of those services.

B. "Timing" of Claim Form Not Invalid

Petitioners contest another feature of the re-employment procedure which they do not explain other than to say, "The timing of Rule 23(d)(2) claim forms is a second issue presented by this case" (Pet. 12). The two cases they mention do not support any objection about the time of the employment procedure.

A settlement in *Pettway* v. *American Cast Iron Pipe Co.*, 576 F. 2d 1157 (5th Cir. 1978), required class members to accept it before its approval or be deemed to have opted out of the class. On appeal by dissatisfied class members, it was held that the imposed option "unfairly burdened" the right to appeal from the approval of the settlement. Here the requirement for

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[24] Pet App. 34a-35a

[25] TWA App. 8a; emphasis added

[26] TWA App. 5a.

filing the claim form stating whether employment was desired did not prevent a class member from objecting to the settlement on that or any other ground and did not, as the form in *Pettway*, exclude the person from the class action. On the contrary, petitioners are making an objection they could have made in 1979 in the approval proceedings.

The clause petitioners quote from the opinion in *Romasanta* v. *United Air Lines*, 717 F. 2d 1140, 1147 (7th Cir. 1983), cert. den. 44 CCH S. Ct. Bull. B2083, is not applicable. There one of several interlocutory appeals objected to the district court's refusal to subdivide the class of approximately 1400 class members into those who wanted to return to work and those who sought only a financial remedy. The court of appeals agreed with the district court, commenting that (as quoted by petitioners) it would be "impossible to determine at this point" which class members wanted employment. This does not mean that the settlement here, in requiring class members to choose re-employment in 1979, imposed a procedure that was not permitted by Rule 23. If it did, the objection should have been made then to the approval of the settlement.

III.

PETITION CONTRARY TO POLICY FAVORING SETTLEMENTS

Petitioners are asking this Court to open up the 1979 settlement agreement that was intended to provide a complete termination of the litigation, putting to rest all claims that had or might have been raised. The changes demanded could have been sought during the settlement approval proceedings in 1979 to 1982. The notice informed them of where and how to object to the settlement (Pet. App. 38a). Now they are trying to avoid clear settlement provisions that they find disadvantageous after they have obtained the benefits of the bargain that all federal courts approved.

The remedies demanded in the lower courts and the certiorari petition are contrary to the policy favoring settlements. That policy is particularly strong here because Congress intended to encourage the settlement of Title VII litigation. *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 88 n 14 (1981). The policy is not needed to support the sound reasons for the decision sought to be reviewed. But review would tend to weaken the policy by prolonging the litigation that the settlement was intended to terminate.

CONCLUSION

Respondent TWA urges the denial of the certiorari petition.

Respectfully submitted.

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APPENDIX

APPENDIX

Rec. No. 191

EXCERPTS FROM SETTLEMENT AGREEMENT

[Filed June 27, 1979]

I. DEFINITIONS

* * *

"Compensation Period" shall mean the period of time which commenced upon the termination of a class member's employment and ends on the date on which this Settlement Agreement is signed by TWA but it does not include any period after the beginning of re-employment for which TWA offered or granted reinstatement as a hostess with full pay, seniority and credit for length of service retroactive to the time when she was ready, willing and able to resume working as a hostess.

"Final Order Date" shall mean the date on which the order described in Section X becomes final and no longer subject to court review.

II. This Agreement is entered into between Trans World Airlines, Inc. (hereinafter referred to as "TWA") and the undersigned representatives of the class for the purpose of compromising, settling and terminating all litigation of the lawsuits (including, but not limited to, the petitions for writs of certiorari now pending in the U.S. Supreme Court, docket numbers 78-1545 and 78-1549) and putting finally to rest all of the claims, issues and questions of fact and law which have or might have been raised on the facts alleged in the pleadings.

The parties agree that the execution of this Agreement by TWA is not and shall not be construed as an admission by it or deemed to be evidence of the validity of any such claims or its liability for any such claims or of any unlawful acts by it

whatsoever, nor shall this Agreement or any of the terms hereof be offered or received in evidence in any civil or administrative action or proceeding as an indication of wrongdoing by TWA or of its legal position in this or other litigation. TWA expressly disclaims any liability in these lawsuits and states that it is entering into this Agreement to avoid further expenses, inconvenience and the distraction of burdensome and protracted litigation.

III. SETTLEMENT BENEFITS TO BE OBTAINED BY CLASS MEMBERS

In consideration of the execution of the Release described herein and in consideration of the dismissal of these lawsuits against TWA in all respects (except, possibly, as to the matters referred to in Section V.B), TWA hereby covenants and agrees to do the things and perform the acts described herein, at the times and in the manners set forth in this Agreement, all of which shall be subject to the conditions set forth herein.

A. TWA will pay to the Class the aggregate amount of Three Million dollars ($3,000,000), as follows:

1. TWA will pay to Class Group A the sum of One Million Five Hundred Thousand Dollars ($1,500,000);

2. TWA will pay to Class Group B the sum of One Million Five Hundred Thousand Dollars ($1,500,000).

After deduction therefrom of all amounts awarded by the Court for plaintiffs' attorneys' fees, costs and expenses of litigation, the net amount will be pro-rated among the class members as provided in Section IV hereof. TWA has no responsibility concerning the calculations or allocations of the total amount among the class members or for fees, costs and expenses.

B. TWA will re-employ as hostesses all class members who are ready, willing and qualified (as defined in Sections VI and IX) to perform the duties required in such re-employment. Any class member who is not either ready, willing or qualified (as defined in Sections VI and IX) for re-employment shall receive from TWA the trip passes described in Section VII.

C. All re-employed class members shall have, be credited with and enjoy the amount of seniority and credit for length of service as is provided in Section V hereof.

D. TWA will have no monetary or other obligation to any member of the class or to any representative or attorney for the class unless expressly provided in this Agreement.

* * *

V. SENIORITY AND CREDIT FOR LENGTH OF SERVICE

A. Each re-employed class member shall be credited with the amount of company seniority and length of service to which she was entitled at the date on which her employment was terminated plus company seniority and such length of service for the entire compensation period, except for those periods of time during which she was disabled from working by reason of pregnancy or otherwise. For each pregnancy which terminated in the birth of a child, the period of disability shall be deemed to be nine (9) months. In the event pregnancy was terminated other than by the birth of a child, the period of disability shall be deemed to be the number of weeks of the pregnancy.

B. TWA agrees with the class that the class members who will be re-employed shall be restored to full occupational (union) seniority and credit for length of service to the same extent as is provided in Section V.A above. However, in the

event of the timely objection of any interested person, it is agreed that the amount of seniority and credit for length of service for the compensation period will be determined by the Court in its discretion, pursuant to the provisions of Section 706(g), and all other applicable provisions of law, without contest or objection by TWA. The Court's award of seniority and credit for length of service will be added to each class member's seniority and credit for length of service to which she was entitled at the time her employment was terminated. The Court's determination will be applied retroactively for all class members who are re-employed after the date of this Agreement but prior to said determination. The class representatives and their attorneys agree and covenant diligently to present to the Court the questions and issues involved in the Court's determination of seniority and credit for length of service within a reasonable time after the entry of an order approving the settlement.

VI. ELIGIBILITY FOR RE-EMPLOYMENT

TWA agrees to offer: (1) flight attendant retraining to all class members and (2) re-employment as flight attendants to those class members who satisfactorily complete such retraining. TWA will provide retraining classes, the last of which shall commence prior to the expiration of one (1) year following the Final Order Date. TWA will have no obligation to retrain or re-employ any class member following the end of such one (1) year period if such class member has either not qualified for such retraining or re-employment, has elected not to participate in such retraining or has elected not to accept such re-employment during such one (1) year period. TWA will not discriminate in any way against any class member by virtue of the fact that she is a class member or adopt or enforce any employment practice, condition or qualification which operates to discriminate against any class member as such. A class member shall be eligible for re-employment if she fulfills

TWA's physical requirements (reasonably applied), medical examination, completion of retraining, and timely files the following described Re-Employment Application; provided, however, that no class member shall be eligible for re-employment who has been re-employed after June 1, 1972 and who has been terminated for cause or who has resigned under circumstances which reasonably do not entitle her to be re-employed.

Each class member who desires re-employment shall in writing so indicate by providing the following information on a Re-Employment Application form to be prepared and distributed by plaintiffs' attorneys:

A. Current full name, name as of termination, social security number, and former TWA employee number

B. Home address and mailing address, including zip code

C. The last TWA base at which she was employed.

D. Approximate date on which she was last employed by TWA

E. Preferences concerning location of new home base

F. The inclusive dates of each full-term and partial-term pregnancy and all other periods of disability.

G. Financial information necessary for the calculation described in Section IV

Each class member desiring re-employment shall forward the said form to the attorneys for the plaintiffs, who shall then keep one copy for retention in their files and forward one copy to TWA. No class member shall be entitled to re-employment under this Agreement unless she completes and returns the aforesaid form to the attorneys for the plaintiffs within sixty (60) days after the date of the commencement of the hearing described in Section X; provided, however that in case of any person who is (a) named in the list of class members attached

hereto but who does not receive notification of her rights because of an incorrect mailing address or (b) not named in the aforesaid list but who demonstrates diligence and entitlement to class membership, the deadline for filing the aforesaid form shall be 30 days prior to the commencement of TWA's last retraining class.

Within thirty (30) days after entry by the Court of an order (if any) determining the matters described in Section V.B., or within thirty (30) days after expiration of the deadline for filing the Re-Employment Application, whichever is later, TWA shall prepare a special list showing the adjusted seniority date of each class member who had applied for re-employment, one copy of which shall be supplied to the attorneys for the class representatives. Each class member's Re-Employment Application shall be acknowledged in writing by TWA by certified mail, addressed to the class member, advising her of her adjusted seniority date.

VII. TRIP PASSES FOR NON-RETURNING CLASS MEMBERS

Each class member who does not become re-employed shall be entitled to receive twelve (12) trip passes for use at any time or times during her lifetime. Each trip pass shall be good for travel on TWA for herself, her spouse or her child (provided that the child is (a) a dependent for IRS purposes and (b) is either under 21 or is a full time student under 23) from origin, point to destination and return to point of origin with enroute stopover privileges. The trip passes will be of the same priority class as trip passes for retired TWA hostesses (Class 9); provided, however, that such retired hostesses and other retired persons utilizing Class 9 passes shall have higher boarding priority.

* * *

IX. RE-EMPLOYMENT PROCEDURES

For the purpose of retraining applicants for re-employment, TWA will conduct retraining classes. TWA will notify each applicant for re-employment (in writing, giving at least thirty (30) days' advance notice) of the commencement date of the retraining class which she is to attend. If the applicant fails within fifteen (15) days after the date of the notice either to accept the offer or provide a reasonable excuse for not accepting, she will forfeit her right to re-employment under this Agreement. Failure to accept any subsequent offer shall forfeit her right to re-employment unless it is due to temporary physical disability or other personal hardship; provided, however, any applicant who is excused from attending a retraining class because of personal hardship shall not accrue seniority for any purpose during the period beginning with the first day of the retraining class from which she was excused and ending on the first day of the retraining class which the applicant eventually successfully completes. Any class member who fails to meet the criteria described herein shall be ineligible to attend that class and she shall have sixty (60) days thereafter within which to meet the criteria. If she is deemed to have failed the medical examination, she may object to the determination made by the company doctor and obtain review thereof by petition to this Court, filed within sixty (60) days after receipt by her of TWA's written advice thereof.

* * *

X. SETTLEMENT PROCEDURES

This Settlement Agreement shall be submitted to the Court for its preliminary approval. If the Court grants preliminary approval and deems it a fit and proper Agreement for submission to the processes described in Rule 23(e), F.R.C.P., plaintiffs' attorneys will draft all orders, notices and other

papers necessary for compliance with the orders and directions of the Court and for the implementation of the procedures required under Rule 23, F.R.C.P., including a proposed form of notice to class members. All such papers shall be submitted to the attorneys for TWA at a reasonable time prior to submission to the Court, in the normal manner applicable to the presentation of any motion or application to the Court. The parties shall jointly file in the United States Supreme Court a motion and stipulation asking that the current pending petitions for writs of certiorari be held in abeyance during the settlement procedures, to be dismissed immediately after the Final Order Date.

Plaintiffs shall prepare an alphabetical list of all class member's names. One copy of the notice shall be sent by first-class U.S. mail to each class member.

The costs of notifying the class, including the preparation and reproduction of notice forms, class lists, purchase of envelopes, postage, handling and mailing, shall be borne by plaintiffs, to be recovered only if and when the Court authorizes reimbursement out of the settlement funds.

After notice has been distributed to class members and after hearing has been held pursuant thereto, plaintiffs and TWA will apply to the Court for an order which approves this Settlement Agreement and dismisses these cases against TWA. Plaintiffs will seek an order which is final and appealable under Rule 54(b), F.R.C.P.

If the Court enters an order in accordance with the foregoing, the Final Order Date, as that term is used in this Agreement, shall be:

A. If no valid notice of appeal is filed within the time prescribed in Rule 4(a), Federal Rules of Appellate Procedure, the date on which the time for filing the notice of appeal expires thereunder.

B. If a valid notice of appeal is filed, the date on which such appeal is dismissed or, if the appeal is not dismissed, the date on which an order is entered which affirms the District Court's approval of the settlement plus the expiration of time or the occurrence of judicial events which render such order no longer subject to review or modification.

If the District Court enters an order disapproving of this Settlement Agreement and said order is not thereafter reversed or modified so that approval is otherwise obtained, this Agreement shall be null and void and shall have no force or effect.

* * *

XIV. ENFORCEMENT OF THIS AGREEMENT

The Order of the District Court approving this settlement shall incorporate and adopt by reference the terms of this Agreement. This Agreement shall be enforceable in the United States District Court for the Northern District of Illinois by virtue of the powers of said Court to enforce its orders and judgments, in addition to any and all other rights and remedies which plaintiffs may have under the common law and statutes of the United States.

Dated this 18th day of June, 1979.

TRANS WORLD AIRLINES, INC.

By: /s/ David J. Crombie

Rec. No. 213

AMENDMENT TO SETTLEMENT AGREEMENT

[Filed August 23, 1979]

The Settlement Agreement which has been heretofore entered into between Trans World Airlines, Inc., and the undersigned representatives of the class is hereby amended as follows:

Section V.B shall provide as follows:

It is agreed that the total amount of seniority and credit for length of service (both accrued and retroactive) for the compensation period will be determined by the Court in its discretion, pursuant to the provisions of Section 706(g), and all other applicable provisions of law, without contest or objection by TWA. The Court's determination will be applied retroactively for all class members who are re-employed after the date of this Agreement but prior to said determination. The class representatives and their attorneys agree and covenant diligently to present to the Court the questions and issues involved in the Court's determination of seniority and credit for length of service within a reasonable time after the entry of an order approving the settlement.

Dated this 22 day of August, 1979.

/s/ ANNE B. ZIPES
Anne B. Zipes,
Individually and on behalf
of the Plaintiff Class

Dated this 17th day of August, 1979.

/s/ PAT SANTINI
Pat Santini,
Individually and on behalf of the
Plaintiff Class

Rec. No. 234

ORDER APPROVING SETTLEMENT AND DISMISSING ACTIONS

The court has considered the proposed Settlement Agreement, as amended, for the compromise of these actions and has considered the written and oral presentations of the parties under Rule 23(e), F.R.C.P. The court finds that proper notice of the proposed settlement and the hearings thereon was given to the members of the plaintiff class and Subclasses A and B; and that no class member objected to the settlement. The court also finds that the settlement agreement is fair, reasonable, and adequate for the parties and Subclasses A and B.

Accordingly, it is ordered, that the Settlement Agreement, as amended, is approved and the actions are dismissed. The court finds, pursuant to Rule 54(b), F.R.C.P., that no just reason exists to delay enforcement of or appeal from this Order.

The court retains jurisdiction:

(a) to determine the total amount of seniority and credit for length of service (both accrued and retroactive) for re-employed class members as provided in Section V B of the Settlement Agreement as amended.

(b) to enforce the terms of the Settlement Agreement and the orders entered herein, including this Order.

(c) to adjudicate any disputes which may arise concerning the interpretation of any part of the Settlement Agreement, including matters relating to the claims of eligibility of class members, and

(d) to determine the amounts of attorneys' fees and reimbursement of costs and expenses which may be awarded to plaintiffs' lawyers and the representatives of the class.

ENTER:

/s/ Stanley J. Roszkowski
Stanley J. Roszkowski, Judge
United States District Court

Dates November 8, 1979

Rec. No. 233

ORDER AWARDING SENIORITY

(Entered November 8, 1979)

The court having considered the evidence, testimony and briefs which have been submitted in connection with the issue of seniority, pursuant to Section 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) and Section V of the Settlement Agreement, as amended, and the court finding that full restoration of retroactive seniority will not have an unusual adverse impact upon currently employed flight attendants in a manner which is not typical of other Title VII cases, it is ordered that each class member who is now employed as a TWA flight attendant or who will hereafter become employed as a flight attendant by TWA under the Settlement Agreement shall be credited with the amount of union (occupational) seniority to which she was entitled on the date on which her employment was terminated, plus credit for such seniority for the "compensation period", as defined in the Settlement Agreement (at page 3), less the deductions provided therein (at p. 8), the terms of which are incorporated by reference and are adopted as part of this Order.

The court having approved the Settlement Agreement in a separate order, it is ordered that this case be, and is hereby, dismissed. The court finds, pursuant to Rule 54(b), F.R.C.P., that no just reason exists to delay enforcement of or appeal from this Order.

However, this court hereby retains jurisdiction:

(a) to enforce the terms of the Settlement Agreement and the orders entered herein, including this Order.

(b) to adjudicate any disputes which may arise concerning the interpretation of any part of the Settlement Agreement, including matters relating to the claims of and eligibility of class members, and

* * * *

(d) to determine the amounts of attorneys' fees and reimbursement of costs and expenses which may be awarded to plaintiffs' lawyers and the representatives of the class.

ENTER:

/s/ STANLEY J. ROSZKOWSKI
Stanley J. Roszkowski. Judge
United States District Court

Dated November 8. 1979

Stamp: UNPUBLISHED ORDER NOT TO BE CITED PER CIRCUIT RULE 35

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

June 1, 1982

Before

Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Thomas E. Fairchild, Senior Circuit Judge
Hon. Richard A. Posner, Circuit Judge

In Re:

CONSOLIDATED PRETRIAL PROCEEDINGS IN THE AIRLINE CASES

No. 77-1325 *vs.*

Appeal of:

AMERICAN AIRLINES, INC. and TRANS WORLD AIRLINES, INC.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

Nos. 70-C-2069
70-C-2071
72-C-498
74-C-2063
and 74-C-2762

Frank J. McGarr, Judge.

ORDER ON REMAND FROM THE SUPREME COURT

On August 24, 1978, we decided an interlocutory appeal (No. 77-1325) from orders of the district court in this action. *In Re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F.2d 1142 (7th Cir. 1978). We affirmed the district court order of October 18, 1976, granting summary judgment to plaintiffs on liability. We vacated the order of October 15, 1976 denying a defense motion to exclude a number of class members. We did so based upon our holding that the district court had no jurisdiction of the claims of a particular subclass.

Defendant TWA applied for *certiorari* to review our decision adverse to it, and plaintiffs sought review of our decision adverse to them.

While the applications for *certiorari* were pending, plaintiffs and defendants settled and the district court approved the settlement, made an award of seniority, and dismissed the action. An intervenor who objected to the settlement appealed. No. 79-2460, No. 79-2465. On June 13, 1980, we affirmed holding that there could be a proper settlement involving the claims as to which we had held there was no jurisdiction because that issue had not been resolved with finality. *Air Line Stewards and Stewardesses Assn. v. Trans World Airlines*, 630 F.2d 1164 (7th Cir. 1980).

On March 9, 1981, the Supreme Court granted *certiorari*, in No. 78-1545, to review our vacation of the order of October 15, 1976; in No. 78-1549, to review our affirmance of the order of October 18, 1976, and other portions of our judgment to which TWA objected; and in No. 80-951, to review our affirmance of the judgment approving the settlement awarding seniority, and dismissing the action. 49 U.S.L.W. 3663.

On February 24, 1982, the Supreme Court decided *Zipes v. TWA*, ____ U.S. ____, 50 U.S.L.W. 4238. In view of the Court's decision decision in the other matters, the Court dismissed the petition of TWA in Supreme Court No. 78-1549, slip op. p. 6, fn. 5. In accordance with the opinion, the Court affirmed the judgment of this court in Supreme Court No. 80-951 (our Nos. 79-2460 and 79-2465). In Supreme Court No. 78-1545 the judgment of this court (our No. 77-1325) was "reversed with costs, and the cause is remanded to the United States Court of Appeals for the Seventh Circuit for further proceedings in conformity with the opinion of this Court."

TWA and plaintiffs have filed statements of position pursuant to our Circuit Rule 19. TWA states that "the proper order of this Court is to vacate its judgment of August 24, 1978 in No. 77-1325." Plaintiffs assert that our affirmance of the judgment in favor of plaintiff on liability "should remain

intact," our judgment, insofar as it dealt with the jurisdictional issue should be vacated, and there should be a remand for futher proceedings.

We conclude:

(1) Now that the Supreme Court has affirmed our judgment affirming the district court's approval of the settlement, award of seniority, and dismissal of the action, our mandate in Nos. 79-2460 and 79-2465 will issue as of course, and any appropriate proceedings in the district court in implementation and enforcement of the settlement will follow by reason of such affirmance.

(2) Insofar as our judgment of August 24, 1978 adjudged "that the district court properly granted summary judgment in favor of the plaintiffs," it has not been reviewed by the Supreme Court, and it should stand, although it has no apparent continuing significance independent of the settlement entered into by the parties and approved by the district court.

(3) Insofar as our judgment of August 24, 1978 adjudged that "the order of October 15, 1976 is VACATED and REMANDED, in accordance with the opinion of this court filed this date," our judgment has been reversed by the Supreme Court and is hereby modified so as to affirm the order of October 15, 1976. In a sense, such affirmance also lacks continuing significance independent of the settlement, but it retains a degree of significance because, as the Supreme Court concluded, it was the Court's reasoning in reversal on this point on which the Court relied in affirming our judgment of June 13, 1980, without deciding whether the particular reasoning which led us to affirm was correct. Slip op. p. 7, fn. 8. *See also* slip op. p. 13.

Our judgment in No. 77-1325 will be modified as herein above provided, and also to award petitioners Zipes, et al. recovery from TWA of $300.00 costs as provided in the judgment of the Supreme Court. The parties shall bear their own costs in this court.

SO ORDERED.

MOTION FOR MODIFICATION OF ORDER AWARDING SENIORITY

[Filed September 8, 1982]

The plaintiff class, by its attorneys, moves this Court for modification of its Order Awarding Seniority, entered November 8, 1979, to provide for the crediting to each class member of an additional amount of union (competitive) seniority for the period subsequent to the Order Awarding Seniority and up to the date on which each class member is rehired by defendant Trans World Airlines, Inc. ("TWA").

The following is set forth in support of this motion:

1. On November 8, 1979, this Court awarded retroactive union seniority to each class member who was then employed by TWA as a flight attendant or who thereafter became rehired by TWA under the Settlement Agreement. The seniority awarded by this Court included credit for competitive seniority up to June 18, 1979.

2. The Court's stated purpose was to accord "full retroactive seniority" to the class members. That is, the purpose of this Court's Order Awarding Seniority was to restore the class members to the seniority positions which they would have held, vis-a-vis other flight attendants, had they not been illegally fired. The granting of full retroactive seniority was consistent with the "make whole" objective of Title VII and the presumption in favor of full retroactive competitive seniority mandated by *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763-766 (1976). In *Albemarle Paper Co. v. Moody*, 442 U.S. 405, 418 (1975), the Supreme Court held that one of the central purposes of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination". In *Franks*, the Supreme Court stated:

> "To effectuate this "make whole" objective, Congress in § 706(g) vested broad equitable discretion in the federal

courts to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate."

* * *

"The provisions of [§ 706(g)] are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. . . . [T]he Act is intended to make the victims of unlawful employment discrimination whole, and . . . the attainment of this objective . . . requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." 424 U.S. at 763-764.

The Court concluded:

". . . federal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims of . . . discrimination in hiring. Adequate relief may well be denied in the absence of a seniority remedy slotting the victim in that position in the seniority system that would have been his had he been hired at the time of his application. It can hardly be questioned that ordinarily such relief will be necessary to achieve the "make-whole" purposes of the Act." 424 U.S. at 764-766.

3. During appellate proceedings subsequent to November 8, 1979, TWA did not rehire any class members. For that reason, no class members will return to work at TWA until long after it was originally contemplated. Based on TWA's recent estimate, the first retraining class will not commence before January 1983, more than three years after the entry of this Court's order which granted seniority. During all of that time, the incumbent flight attendants have continued to accrue competitive seniority, while the seniority of the class members has remained frozen by the fortuity of the appeals.

4. The mere passage of time in this case will have the effect of undermining the purpose and diminishing the value of the award of seniority granted by this Court. For example, if a class member who had been dismissed in July 1970 were to have been rehired in December 1979, that class member would now have a higher seniority status than all those stewardesses hired after 1970. On the other hand, if that same stewardess is actually rehired after January 1983, she may, depending on when she was originally hired, have to return to work with less seniority than currently active stewardesses who were hired between 1971 and 1973. Thus, the Order awarding seniority will not have the effect, as required by *Franks*, of "slotting the victim in that position in the seniority system that would have been [hers]" had there been no dismissal.

6. The clear intent of this Court's Order Awarding Seniority to grant "full restoration of retroactive seniority" to the class members will be thwarted unless the Order is modified to provide for the award of additional seniority up to the time when the class members are actually rehired by TWA.

WHEREFORE, the plaintiff class prays that this Court enter an order modifying its Order Awarding Seniority, to provide that in addition to the seniority previously awarded, each class member who has been or will be rehired by TWA pursuant to the Settlement Agreement shall be credited with full union (competitive) seniority from November 8, 1979 to the date of reemployment.

Respectfully submitted.

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MOTION TO ENFORCE CERTAIN TERMS OF THE SETTLEMENT AGREEMENT

[Filed October 6, 1982]

Now come plaintiffs, members of Subclasses A and B, by their counsel, and respectfully move this Court to compel TWA's compliance with the Settlement Agreement provisions regarding re-employment rights. A number of class members indicated their preference for trip passes rather than re-employment three years ago. Some of these persons now wish to be re-employed as flight attendants. TWA has recently taken the position that a "No" re-employment election made three years ago cannot be later changed. *See* letter of September 9, 1982, from William S. Borden, TWA's staff Vice President of In-Flight Services, to Laurence A. Carton, attached hereto as Exhibit A.

Background

A "Claim Form For Settlement Benefits" was completed by most class members in the summer of 1979, *over three years ago.* One of the questions asked on the claim form is "Do you desire re-employment as a TWA Hostess?" Next to the question are boxes labeled "Yes" and "No." The class members affected by this motion checked the "No" box. The Settlement Agreement itself provides, in pertinent part:

> TWA will reemploy as hostesses all class members who are ready, willing and qualified (as defined in Sections VI and IX) to perform the duties required in such reemployment. Any class member who is not either ready, willing or qualified (as defined in Sections VI and IX) for reemployment shall receive from TWA the trip passes described in Section VII. (Section III B.)
>
> TWA will have no obligation to retrain or reemploy any class member following the end of such one (1) year period if such class member . . . has elected not to accept such reemployment during such one (1) year period. (Section VI.)

> A class member shall be eligible for reemployment if she . . . timely files the following described ReEmployment Application. . . .
>
> The Borden letter (Ex. A) states:
>
> Nine class members . . . previously indicated that they did not desire reemployment and now wish to change their election.*
>
> As time limits for original claim submittal are specific in the Settlement, TWA remains firm in its position that a "No" re-employment election cannot be later changed.

Discussion

The Settlement Agreement itself states that TWA will re-employ all class members who are "ready, willing and qualified." TWA is now taking the position that it will *not* re-employ certain class members who have indicated that they *are* "ready, willing and qualified" to accept the re-employment option. Both the Agreement itself and equitable principles demonstrate that TWA is wrong.

The Agreement itself nowhere states or implies that a class member's initial indication of her preference as to the re-employment or trip passes options will be binding and irrevocable. Nor does the claim form indicate the finality of such a choice. In fact, the Agreement itself states that re-employment will be offered to any class member who is "ready, willing and qualified." It also states that "a class member shall be eligible for re-employment if she . . . timely files the following described Re-Employment Application."

The "Re-Employment Application" referred to in the Agreement is the previously discussed Claim Form completed by class members three years ago. Each and every class

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* These 9 women are members of Subclass B. At least 1 member of Subclass A also desires to "change her election."

member has timely filed a "re-employment application"/Claim Form. Each class member has thereby established her right to the re-employment option. Furthermore, Section VI of the Agreement provides that TWA has "no obligation" to re-employ *if* a class member "has elected not to accept such re-employment during such one (1) year period." As this Court is well aware, the one year period did not commence running until April of this year. The class members in question are electing, *during* the one year period, to *accept* the re-employment option. TWA is thus obligated to re-employ these members. Nothing in the Agreement supports TWA's opinion that the option indicated three years ago is binding and irrevocable.

Equitable principles also require that these class members be given the re-employment option today even though they initially opted for the trip passes. Three full years have elapsed since the original claim forms were completed. The individual circumstances of all class members have changed. For example, a woman may have indicated "no" to re-employment due to the location of her residence, the age or health of her children, or her financial circumstances at that time. These are all circumstances which can change drastically during the course of three years. A preliminary indication regarding the desire to be re-employed should not preclude a class member's later determination that she wants to be re-employed under the circumstances presented here.

Furthermore, TWA has not hesitated to allow class members to make a similar change of decision regarding the trip pass option. Some class members who initially opted for re-employment have recently changed their minds and requested the trip passes. TWA has acceded to these requests. See Borden letter..Exhibit A.

For the foregoing reasons, plaintiffs ask that TWA be ordered to allow class members to opt for re-employment even though they initially indicated "no" to the re-employment option. TWA's present efforts to retrain all class members immediately make it imperative that this issue be resolved without delay.

Respectfully submitted,

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No. 84-240

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

NANCY FREEDMAN, *et al.*,
Petitioners,
v.
TRANS WORLD AIRLINES, INC., and
INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION OF INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS

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BRIEF IN OPPOSITION OF INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS

STATEMENT OF THE CASE

The Independent Federation of Flight Attendants (IFFA), an intervenor in this litigation and a Respondent herein, today offers the Court the following explanation of the history and posture of this case. Although IFFA is not listed as a respondent on the face of the *Petition for Certiorari*, IFFA has been a party to this litigation since 1979 and participated fully in the proceedings that relate to the issues now presented to the Court.

This case is now more than fourteen years old, and has thus far produced seven opinions from the Court of

Appeals, one Supreme Court opinion,[1] and five petitions for *certiorari*. While we will try to be succinct, it is not possible to understand the issues presented in the Petition without a somewhat detailed chronology of the history of the litigation.

A. Proceedings before this Court's opinion in *Zipes*

Until October of 1970, Respondent Trans World Airlines, Inc. (TWA) maintained a "no-motherhood" policy resulting in the termination of female flight attendants who became mothers. On May 30, 1970, a charge was filed with the Equal Employment Opportunity Commission (EEOC) challenging this practice. This was the first such charge filed. A class-action complaint was filed on August 18, 1970, in the United States District Court for the Northern District of Illinois, alleging that TWA's no-motherhood policy violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* The purported class consisted of all flight attendants terminated on account of motherhood since July 2, 1965 (the effective date of the Act). One of the class representatives was the union then representing TWA's flight attendants, the Air Line Stewards and Stewardesses Association (ALSSA).

TWA and the class representatives reached a tentative settlement in 1971, under which each class member would be allowed to obtain reemployment with TWA. The settlement provided that each class member be credited with the competitive seniority accrued at the time of her termination, but no retroactive seniority for the period between termination and reemployment. Moreover, the settlement provided for *no* payment of any backpay by TWA. The District Court approved the settlement. However, dissident class members appealed and the Seventh Circuit reversed. *ALSSA v. American Airlines, et*

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[1] *Zipes v. TWA, et al.*, 455 U.S. 385, 102 S.Ct. 1127 (1982).

al., 490 F.2d 636 (7th Cir. 1973), *cert. den.*, 416 U.S. 993 (1974).[2] The Court of Appeals said that ALSSA had a conflict between the interests of the class members and the incumbent flight attendants, and directed that ALSSA be removed as a class representative.[3]

After the first settlement was aborted, new class representatives were appointed and the case proceeded on the merits. In 1976 the District Court ruled that TWA's policy was indeed violative of Title VII. However, TWA moved to exclude from the class all women terminated more than ninety (90) days prior to May 30, 1970 (the filing date of the first EEOC charge). This motion was made pursuant to 42 U.S.C. § 2000-e5(d) (1970), which at that time imposed a 90-day time limit for filing a charge pursuant to Title VII. The District Court denied this motion on October 15, 1976, holding that TWA had engaged in a "*continuing violation of plaintiffs' rights which existed until the time the defendant changed the challenged policy.*" This order is contained in the Appendix to this Brief (hereinafter "App.") at p. 1a. Thus the District Court held that the claims of all class members were timely.

The Seventh Circuit, however, reversed in an opinion known as *In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F.2d 1142 (1978). While agreeing that TWA's policy was illegal, the Court of Appeals found that there was *no continuing violation* and thus the claims of all women terminated more than ninety days prior to the filing of the EEOC charge *were untimely.* The Seventh Circuit held that the time limit began to run from the date of termination, not the date TWA changed

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[2] For a time this suit was consolidated with a similar action against American Airlines.

[3] Thus ALSSA, which is now defunct, has not been a party to this case since 1974. Nonetheless it frequently incorrectly appears on case captions, as exemplified by the Petition herein.

its policy. 582 F.2d at 1149. The court then considered an argument by Plaintiffs that TWA had *waived* its timeliness defense. The Seventh Circuit held that it *need not consider this argument*, because the Title VII time limits were jurisdictional in nature and could not be waived. Specifically, the court stated:

> Although it is questionable whether any concessions made at a settlement hearing should be held to constitute a waiver when the settlement is subsequently overturned, *we need not reach this question* as our conclusion that this filing requirement was jurisdictional *precludes* a finding of waiver. (582 F.2d at 1151) (emphasis supplied).

Plaintiffs then sought *certiorari* (No. 78-1545) *solely* on the issue of whether the Title VII time limits were subject to waiver. They did *not* appeal the Seventh Circuit's decision that there was no continuing violation. TWA cross-petitioned (No. 78-1549), but before the Court acted upon these petitions, Plaintiffs and TWA again reached a tentative settlement. Pursuant to the new settlement the class was divided into two subclasses: Sub-Class A consisted of those class members whose claims were clearly timely (about 8% of the total class), and Sub-Class B consisted of those class members whose claims were found to be untimely by the Seventh Circuit (about 92% of the total class).[4] TWA was required to pay 1.5 million dollars ($1,500,000.00) to each sub-class. Moreover, TWA was to offer reemployment to all class members upon the occurrence of vacancies in the TWA flight attendant system. The District Court was empowered by the settlement to grant to each class member who opted for reemployment retroactive competitive seniority from the date she originally was hired by TWA through and until the date the Settlement Agreement was signed by TWA in June of 1979.

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[4] The Class has been estimated to be 450 women.

At this point IFFA, which had replaced ALSSA as the labor union representing TWA's flight attendants, intervened in the proceedings before the District Court and objected to the settlement and to any grant of retroactive competitive seniority to the Plaintiffs. IFFA's two principal arguments were: (1) since the Seventh Circuit had held that there was no subject matter jurisdiction over the claims of Sub-Class B, the District Court had no jurisdiction to approve a settlement of those claims and grant seniority to those Plaintiffs; and (2) that in any event seniority should not be granted to Sub-Class B because those women had not prevailed on the merits and in fact the Seventh Circuit had ruled that these claims were untimely. The District Court overruled IFFA's arguments, approved the settlement, and granted to Plaintiffs the maximum seniority allowable under the Settlement Agreement. The Seventh Circuit affirmed in an opinion reported at 630 F.2d 1164 (7th Cir. 1980). Both the District Court and the Court of Appeals felt that the District Court had power to approve the settlement and grant seniority to Sub-Class B members regardless of whether the District Court had subject matter jurisdiction over those claims.

IFFA then filed for *certiorari* (No. 80-951), raising the two arguments mentioned above. In March of 1981, the Court granted IFFA's Petition in No. 80-951 and also granted *certiorari* in Nos. 78-1545 and 78-1549 and consolidated the three appeals.

B. The *Zipes* opinion

The opinion of this Court issued on February 24, 1982, *sub nom. Zipes v. Trans World Airlines, Inc., et al.*, 455 U.S. 385, 102 S.Ct. 1127. The Court first took up the issue in No. 78-1545 and held that the Title VII time limits are not jurisdictional in nature and can be subject to waiver and estoppel. The Supreme Court did *not* rule on the issue of whether TWA *had* waived the timeliness

defense, an issue upon which the Court had not been asked to rule and upon which neither of the lower courts had ever ruled.

The Court then turned to IFFA's arguments in No. 80-951. The issue of whether a court had jurisdiction to approve a settlement when it lacked jurisdiction over the merits was obviously mooted by the Court's prior decision that there was in fact no jurisdictional barrier. The Court then took up IFFA's second issue, that Sub-Class B members could not be granted seniority at the expense of the incumbent flight attendants because Sub-Class B members had not prevailed on the merits and in fact their claims had been held untimely by the Seventh Circuit. The Court gave this issue short shrift, stating:

> With the reversal of the Court of Appeals judgment in No. 78-1545 and our dismissal of No. 78-1549, which had challenged the affirmance of the summary judgment order, the order that found class-wide discrimination remains intact and is final. The award of retroactive seniority to members of Subclass B as well as Subclass A is not infirm for want of a finding of a discriminatory employment practice. 455 U.S. at 399, 102 S.Ct. at 1135.

This statement by the Court is, however, *incorrect.* As demonstrated above, the District Court's grant of summary judgment had been premised upon a finding that TWA had engaged in a *continuing violation,* thus making the claims of Sub-Class B timely and valid. The Seventh Circuit, however, had found that there was *no continuing violation* and that Sub-Class B claims were untimely, a holding *undisturbed* by the Supreme Court's ruling in *Zipes.* Thus, the summary judgment granted by the District Court *did not* remain intact but remains reversed as to Sub-Class B because there was no continuing violation, subject only to further proceedings in which Plaintiffs might be allowed to advance their argument that TWA had waived the timeliness defense.

C. Proceedings subsequent to the *Zipes* opinion

Shortly after the issuance of this Court's opinion in *Zipes*, a dispute arose between Plaintiffs and TWA regarding the date of reemployment of Plaintiffs. TWA contended that it was not obligated to employ Plaintiffs unless and until it had "vacancies" in its flight attendant work force, and noted that it had had no vacancies since the Settlement Agreement had been signed in June of 1979. Plaintiffs contended that TWA was obligated to employ them within a year of the Supreme Court's order finally approving the settlement, regardless of whether "vacancies" existed. The District Court ruled in favor of the Plaintiffs, but the Seventh Circuit reversed, holding that TWA did not have to employ Plaintiffs unless and until TWA deemed that "vacancies" existed. See Case Nos. 82-2929 and 82-2933, App. 5a, decided August 1, 1983.

In May of 1983, vacancies began to arise at TWA and all Plaintiffs who had opted for reemployment were allowed to commence employment over a period of several months. It is believed that the actual number of Plaintiffs who returned is 207. This number is greater than the estimates given to the District Court at the time the settlement was approved and seniority was granted to Plaintiffs along with a finding that such seniority would have no unusual adverse impact upon incumbents.[5]

It was at this point that Plaintiffs filed the motion at issue in their current Petition. Plaintiffs asked the District Court to grant to all Plaintiffs who returned to TWA additional competitive seniority *beyond* that allowed by the Settlement Agreement. As mentioned ear-

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[5] While it is true as Plaintiffs point out that some members who chose reemployment later decided against it, a greater number of new class members surfaced who were allowed to elect reemployment subsequent to the November, 1979 approval of the settlement agreement by the District Court.

lier, the Settlement Agreement limited any grant of seniority to the "Compensation Period", which the Agreement defines as each Plaintiff's original date of hire by TWA through the date TWA signed the Settlement Agreement in June of 1979. Plaintiffs now sought seniority for the period between the date of the signing of the Settlement Agreement in 1979 and the date each Plaintiff returned to TWA sometime during 1983. Plaintiffs also asked that any class members who had elected not to seek reemployment with TWA (such election being made on sworn claim forms proffered by each class member during the proceedings that led to the approval of the Settlement Agreement by the District Court in 1979) now be allowed to change their minds and become TWA flight attendants.

The District Court denied both requests on April 23, 1983 (Appendix to Plaintiffs' Petition, p. 20a, hereinafter "Pet. App."). Judge Roszkowski felt that Plaintiffs were bound by their own Settlement Agreement, which limited any grant of seniority to June of 1979 and also specifically required that the reemployment option be exercised no later than December 2, 1979. The Seventh Circuit affirmed on March 27, 1984 (Pet. App. 1a). Regarding Plaintiffs' arguments that "changed circumstances" required a grant of additional seniority the Court of Appeals stated that the "[C]hange of circumstance was neither unforeseeable nor so exceptional as to satisfy the standard for modification . . .". (Pet. App. at 11a). Similarly, the claim to allow some Plaintiffs to change their minds and opt for reemployment now was rejected not only due to the specific terms of the Settlement Agreement but also because the courts had relied on the number of returning Plaintiffs asserted in 1979 in determining that the seniority granted would not have any "unusual adverse impact" upon incumbents (Pet. App. at 14a).

Finally, the seniority granted by the District Court in 1979 and subsequently affirmed by the appellate courts was premised in large part on the assertions made by Plaintiffs and TWA that the seniority granted to Plaintiffs would not cost any incumbent flight attendants their jobs. See, for example, the Seventh Circuit's 1980 opinion, where the court said:

> Testimony indicated that providing positions for these reinstated attendants would normally be possible as a result of normal attrition of workers in less than half a year. The agreement provided that no currently employed attendant would be required to lose employment in order to accommodate a reinstated attendant. 630 F.2d 1164, at 1169.

In fact, it has not happened that way. TWA has been in a continuous furlough situation since 1979, and has not hired a single flight attendant since before the Settlement Agreement was signed in June of 1979. Hundreds of flight attendants who had jobs prior to the settlement are currently furloughed. And for each Plaintiff who has returned to TWA, an incumbent flight attendant is currently on involuntary furlough *due to the seniority granted Plaintiffs* pursuant to the settlement.

ARGUMENT

I. Plaintiffs Are Not Victors On The Merits And Are Bound By Their Settlement

The first question presented in the Petition is based entirely upon Plaintiffs' claim that pursuant to this Court's opinion in *Zipes*, Plaintiffs are to be treated not as parties who settled but as having obtained full victory on the merits of their claims. This claim springs from the language in the *Zipes* opinion (which we would like to call *dicta*) indicating that as a result of *Zipes*, the District Court's summary judgment was completely reinstated. However, as indicated in our Statement of the

Case, that summary judgment *could not* have been reinstated, since the *Zipes* opinion left undisturbed the Seventh Circuit's reversal of the District Court's finding that TWA had engaged in a continuing violation.

Counsel herein does not take lightly the task of explaining to the Supreme Court of the United States that it misstated the record in a case before it. Nonetheless, that record is clear and unambiguous and the Court's misstatement is obviously central to the issues raised today. Moreover, the Seventh Circuit recognized this very point in the opinion which Plaintiffs now seek to have overturned, stating:

> [T]he Supreme Court's holding in *Zipes* does not entirely settle the issue of the validity of the claims of Subclass B members, the district court's observation concerning TWA's possible waiver of this defense indicates that *perhaps* none of the claims of any class members was barred. (Pet. App. at 6a, n.5, emphasis supplied).

The Seventh Circuit is correct. If it were determined that TWA had somehow waived its right to assert its defense that the claims of Sub-Class B were untimely (and that IFFA was bound by TWA's waiver), then none of the Plaintiffs' claims would be barred. If, however, TWA had not committed any such waiver, then the claims of 92% of the Plaintiffs would simply be dismissed.[7]

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[7] In addition, statements by the Court itself in Part I of the *Zipes* opinion demonstrate this point:

> While the District Court agreed that the filing requirements of Title VII are jurisdictional, it denied the motion on the basis that any violation by the airline *continued* against all the class members until the airline changed the challenged policy.
>
> . . . (The Court of Appeals) *declined*, however, "to *extend the continuing violation* theory, as did the district court, so as to include in the plaintiff class those employees who were perma-

In addition, the Plaintiffs' actions belie their arguments. If Plaintiffs truly believed they were final victors on the merits they would be seeking not just seniority but also many millions of dollars. The total backpay liability for all Plaintiffs would certainly be more than a dozen times the amount paid pursuant to the settlement. For example, the average Sub-Class B member received (after deduction for attorneys' fees) less than $2,000 each as compensation for 13-18 years of backpay. The fact that Plaintiffs have never sought more money from TWA since *Zipes* shows that they are hardly serious about their claim to be victors and not settlors.

Why Plaintiffs believe their cause is helped by *Firefighters Local Union No. 1784 v. Stotts*, —— U.S. ——, 104 S.Ct. 2576 (1984), or *Romasanta v. United Air Lines, Inc.*, 717 F.2d 1140 (7th Cir. 1983), is a mystery. In *Stotts*, this Court refused to allow a District Court to modify a consent decree by ordering layoffs of non-minority employees to protect the jobs of minority employes with less seniority hired pursuant to the consent decree. Here, settling Plaintiffs were granted enough seniority to force incumbent employes to be on furlough. In *Romasanta*, the plaintiffs *did not settle, but prevailed after full litigation* of their claims. Nonetheless, the district court only granted to plaintiffs the seniority held at the time of their termination, due to the recessionary/layoff situation at United and the impact full seniority

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nently terminated more than 90 days before the filing of EEOC charges"....

The Court of Appeals went on to hold that timely filing of EEOC charges was a jurisdictional prerequisite. (455 U.S. at 389, 102 S.Ct. at 1130, emphasis supplied).

See also the concurring opinion of Justice Powell which states "[I]n view of (this case's) complexity it is difficult to be certain as to what happened and when." 455 U.S. at 402, 102 S.Ct. at 1137. Statements by counsel for Plaintiffs and TWA in their briefs in *Zipes* and at oral argument also clearly demonstrate that no court has ever ruled that TWA waived its timeliness defense.

would have upon incumbents. The difference between *Romasanta* and this litigation is that at the time the *United* plaintiffs sought seniority the recession in the airline industry was in full bloom, whereas at the time the Settlement Agreement here was approved that recession had not yet begun. If anything, *Stotts* and *Romasanta* indicate Plaintiffs should have received *less* seniority, not more.

II. The New Conditions Of Which Plaintiffs Complain Were Entirely Foreseeable And Have Harmed Incumbents Far More Than Plaintiffs

The "changed circumstances" of which Plaintiffs complain is the fact that they were not reemployed by TWA until 1983 due to the fact that TWA had no vacancies before then. Instead of acknowledging that they misled the District Court and that because of the seniority granted previously 207 incumbents are currently on furlough, Plaintiffs ask for four more years of seniority. But as the Seventh Circuit indicated, the delay in Plaintiffs' return was entirely foreseeable. Substantial delay in reemployment was clearly anticipated by the Settlement Agreement Plaintiffs negotiated, which said that Plaintiffs would not be reemployed until TWA had vacancies. Moreover, due to the great amounts of seniority already granted to Plaintiffs, they are not in any danger of losing their jobs. Thus, the lower courts properly rejected Plaintiffs' request for more seniority due to changed circumstances.[8]

---

[8] Any claim by Plaintiffs that IFFA is to blame for the delay in their reemployment is frivolous in light of the Seventh Circuit's decision (in Case No. 82-2929, App. at 5a) that TWA did not have to hire Plaintiffs until vacancies existed, since none did between 1979 and 1983. In any event, the litigation over the seniority issue was clearly anticipated by the Settlement Agreement.

III. The Claim Forms, Settlement Agreement, And Class Notice Are Not Ambiguous

No conflict exists between *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950), because it is perfectly obvious that all class members knew what they were doing when they elected or did not elect to seek reemployment in 1979. The Notice to Class Members states that "[T]o be eligible for reemployment" class members must "[C]omplete the enclosed Claim Form. . ." (Pet. App. at 35a). The claim form itself specifically asked "Do you desire reemployment as a TWA hostess?" (Pet. App. at 25a) and each class member filled out her form under oath. Moreover, the Settlement Agreement itself clearly requires claim forms to have been filed in 1979. It hardly seems necessary to mention that the Settlement Agreement and Notice were drafted by Plaintiffs' counsel who now seek to find and take advantage of their own ambiguity. Obviously each class member understood what choice she was making when she executed her claim form, and there is no issue worthy of review by this Court.

IV. Plaintiffs' Fourth Issue Is Without Merit

The Notice to Class Members (Pet. App. at 32a) informed Plaintiffs that the District Court would be empowered to grant them seniority and that "[P]laintiffs intend to seek full retroactive seniority for the entire period up to June 18, 1979." (Pet. App. at 36a). Such seniority was in fact granted. Since Plaintiffs received the maximum seniority available, we fail to understand of what Plaintiffs complain in their fourth Question Presented. Given the fact that no Plaintiffs opted out of the settlement when they did not know how much seniority would be granted, it is difficult to understand why any of the Plaintiffs would have wanted to opt out had they known that the maximum seniority possible would have been granted. Further, we note (1) that the settlement

proceedings were structured in the manner Plaintiffs' counsel desired; (2) any complaints regarding the sufficiency of the 1979 proceeding should have been appealed in 1979; and (3) the thrust of Plaintiffs' argument seems intended to vitiate the settlement they have fought so long to uphold.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Master File No. 70 C 2071

This document relates to:

No. 70 C 2069
No. 70 C 2071
No. 72 C 498
No. 74 C 2063
No. 74 C 2762

IN RE CONSOLIDATED PRETRIAL PROCEEDINGS
IN THE AIRLINE CASES

MEMORANDUM OPINION AND ORDER

On November 18, 1974, The Honorable Richard J. McLaren issued a memorandum opinion and order allowing defendants Trans World Airlines, Inc. and American Airlines, Inc. to amend their answers to include the "affirmative defense" of the statute of limitations contained in 42 U.S.C. § 2000e-5e. This statute imposed a ninety-day period after an alleged unlawful practice within which a charge could be filed with the Equal Employment Opportunity Commission. Judge McLaren noted and left open the question of whether defendants' delay in pleading the defense of limitations constituted a waiver of the defense.

Defendants are now moving to exclude certain persons of plaintiffs' class for lack of subject matter jurisdiction, urging that Title VII's time limits are not a matter of defense but are, rather, jurisdictional prerequisites not

subject to waiver by the actions of the defendants. Factually, they are seeking to exclude all persons whose employment was terminated on the grounds of pregnancy more than ninety days prior to May 31, 1970, the date of filing by the original plaintiff-union, Air Line Stewards and Stewardesses Association, Local 550.

Several courts have recently considered the question of whether Title VII's time limits are in the nature of statutes of limitations or jurisdictional prerequisities, and have concluded the former. *Reeb* v. *Economic Opportunity Atlanta, Inc.*, 516 F.2d 924 (5th Cir. 1975); *Dartt* v. *Shell Oil Co.*, —— F. 2d ——, 13 FEP Cases 12 (10th Cir. 7/22/76); 408 F. Supp. 229 (D. Conn. 1976).

The Seventh Circuit, however, has characterized the issue as jurisdictional. *Choate* v. *Caterpillar Co.*, 402 F. 2d 357 (7th Cir. 1968); *see* also *Evans* v. *United Air Lines, Inc.*, 534 F. 2d 1247 (7th Cir. 1976); *McGuire* v. *Aluminum Company of America*, —— F. 2d ——, No. 76-1013 (7th Cir. 9/9/76). This court is persuaded that the Seventh Circuit holding is correct and that the time requirements of Title VII are jurisdictional in nature.[1]

Having so decided, the next question for resolution is whether the claims of certain class members are time-barred. Defendants' motion is grounded upon the assumption that the violation occurred at the moment of termination due to pregnancy and, therefore, the ninety days began to run for each class member at that moment. Plaintiffs, on the other hand, assert the existence of a "continuing violation" which existed at least until the airlines abandoned their policy of refusing to rehire mothers.

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[1] Plaintiffs urge that this court should estop the defendants from raising the jurisdictional question. E.g., *DiFrischia* v. *New York Central Railroad*, 279 F.2d 141 (3rd Cir. 1960). Because of the view we takes of this case, we need not reach this extraordinary estoppel question.

We agree with the plaintiffs' view of this action. If this case sought only to challenge the policy of firing pregnant stewardesses, we would agree that the ninety-day limit began to run the moment of termination. But, as noted in our memorandum opinion and order dated April 28, 1976, this case challenges a policy much more broad than that. It challenges the "no motherhood" policy which begins at pregnancy, yet continues to prevent the re-hiring of the alleged class members once pregnancy is at an end. Thus, we find a continuing violation of plaintiffs' rights which existed until the time that defendants changed the challenged policy.[2] *See, Boudreaux* v. *Baton Rouge Marine Contracting Co.*, 437 F. 2d 1011 (5th Cir. 1971); *Macklin* v. *Spector Freight Systems, Inc.*, 478 F. 2d 979 (D.C. Cir. 1973). Because of the essential difference between the parties as to the nature of the violation here, and the court's agreement with the plaintiffs' position, defendants' authorities do not compel a different result.[3]

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[2] We note further, although we do not base our holding today thereon, plaintiffs' allegations that the effects of the discriminatory policy continued past that date as to all stewardesses who are not rehired pending the outcome of this case because they failed to waive their claims to back-pay. The allegation with respect to back-pay appears to be within the scope of *Evans* v. *United Airlines, Inc., supra.* Perpetuation of a disadvantage suffered because of a past discrimination is itself a violation thereunder.

[3] We have considered, too, the Memorandum of Movants for Intervention in Reply to Plaintiffs' Memorandum in Response to Defendants' Motion to Exclude Certain Persons From the Class. The memorandum is directed basically towards a final remedy in this case and against various allegations made by plaintiffs with respect to this predecessor union's good faith. That memorandum does not call for a different result within the context of this motion.

For the foregoing reasons, defendants' motion to exclude certain persons from the class for lack of subject matter jurisdiction is hereby denied.

/s/ Frank J. McGarr
United States District Judge

Dated: October 15, 1976

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 82-2929

AIR LINE STEWARDS AND STEWARDESSES ASSOC., Local 550, TWU, AFL-CIO, *et al.*,
Plaintiffs-Appellees,

v.

TRANS WORLD AIRLINES, INC.,
Defendant-Appellant.

No. 82-2933

ANNE B. ZIPES, *et al.*,
Plaintiffs-Appellees,

v.

TRANS WORLD AIRLINES, INC.,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 70 C 2071 and 70 C 2063—Stanley J. Roszkowski, Judge.

ARGUED APRIL 7, 1983—DECIDED AUGUST 1, 1983

Before CUMMINGS, *Chief Judge*, COFFEY, *Circuit Judge*, and WEIGEL, *Senior District Judge.**

COFFEY, *Circuit Judge*. The defendant, Trans World Airlines (TWA) appeals from the district court's decision that under the terms of a Settlement Agreement entered into between TWA and a class of former flight attendants, TWA is required to re-employ the former female flight attendants immediately upon the completion of certain retraining classes regardless of whether or not TWA has any present vacancies in its work force. The defendant, on the other hand, contends that the Settlement Agreement requires TWA to re-employ the flight attendants after they have completed retraining but only at such time as a vacancy exists. Reversed.

I.

The complaint in this litigation was filed on August 8, 1970, alleging that between 1965 and 1970 the defendant TWA maintained a policy of terminating female flight attendants who became pregnant, and that such action was in violation of their rights under Title VII of the Civil Rights Act of 1964. After numerous pretrial motions and appeals from the disposition of these motions [1] the parties arrived at a Settlement Agreement, contingent upon approval by the district court pursuant to Fed. R. Civ. P. 26(e). The district court approved the settlement over the objection of the union representing current TWA personnel who might have been affected by the settlement (Independent Federation of Flight Attendants). The union objected to the settlement, contending that the Settlement Agreement would adversely affect

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* The Honorable Stanley A. Weigel, Senior District Judge of the Northern District of California, is sitting by designation.

[1] For an in-depth examination of the procedural history of the instant case *see Air Lines Stewards, Etc. v. Trans World Airlines, Inc.*, 630 F.2d 1164, 1165-66 (7th Cir. 1980).

current TWA flight attendants. The district court disagreed on the grounds that granting retroactive seniority to the returning class members would not adversely affect TWA's present employees as no currently employed flight attendant would be fired in order that one of the class members could be reinstated, and this decision was affirmed by this court, *Air Line Stewards, Etc. v. Trans World Airlines, Inc.*, 630 F.2d 1164 (7th Cir. 1980), and ultimately by the Supreme Court, *Zipes, et al. v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982).

In October of 1982 the plaintiffs filed a motion with the district court requesting an order that the Settlement Agreement be interpreted as entitling all class members to immediate re-employment by TWA upon the successful completion of their retraining classes. In addition to this declaratory relief, the plaintiffs also sought a permanent injunction compelling TWA to commence paying wages to all re-employed class members immediately upon completion of the retraining classes regardless of whether or not TWA had positions for the retrained flight attendants. The district court granted the plaintiffs' motion for declaratory relief on the grounds that "the settlement agreement, when read as a whole and considered in light of its fundamental purpose, does require that TWA re-employ the class members" and that TWA "is obligated to provide employment no later than the end of the last retraining class . . . ." The defendant has appealed from the district court's decision.

II.

Our resolution of the instant dispute hinges upon the construction of two sections of the Settlement Agreement. Section VI of the Settlement Agreement is entitled "Eligibility for Re-Employment" and provides as follows:

> "TWA agrees to offer: (1) flight attendant retraining to all class members and (2) re-employment as flight attendants to those class members who

satisfactorily complete such retraining. TWA will provide retraining classes, the last of which shall commence prior to the expiration of one (1) year following the Final Order Date. TWA will have no obligation to retrain or re-employ any class member following the end of such one (1) year period if such class member has either not qualified for such retraining or re-employment, has elected not to participate in such retraining or has elected not to accept such re-employment during such one (1) year period."

Section IX, entitled "Re-Employment Procedures," states:

"For the purpose of retraining applicants for re-employment, TWA will conduct retraining classes. TWA will notify each applicant for re-employment (in writing, giving at least thirty (30) days' advance notice) of the commencement date of the retraining class which she is to attend.

* * * *

Each class member who successfully completes retraining will be permitted to select assignment to a flight attendant base (or bases) of her choice, at which a vacancy exists, provided that no flight attendant having greater seniority desires to fill such a vacancy. If a class member is unable to obtain a base assignment which she desires, she will be assigned to fill a vacancy at any base selected by TWA."

The district court, in interpreting the Settlement Agreement, noted that in Section VI "TWA agrees to offer . . . re-employment as flight attendants to those class members who satisfactorily complete such retraining," and that section IX of the Agreement grants the class members a "right to re-employment." Reading these two sections together, the district court concluded that "these terms unambiguously evidence the parties

intent that TWA undertake an affirmative obligation to re-employ class members," and while section IX makes a class member's assignment to a base contingent upon a "vacancy," this section "has no effect whatsoever on the obligation to rehire." Finally, the district court declined to adopt TWA's position that it should not be required to rehire a flight attendant until a vacancy exists because "if TWA were permitted by the settlement agreement to indefinitely delay the re-employment of the class members, there would have been no reason to fix the definite time limit of April 19, 1982 from which training classes had to begin."

III.

A settlement agreement is a contract and as such, "the construction and enforcement of settlement agreements are governed by principles of local law applicable to contracts generally." *Florida Educational Assoc. v. Atkinson*, 481 F.2d 662, 663 (5th Cir. 1973). When interpreting a contract under Illinois law, "[t]he intent of the parties to a contract must be determined with reference to the contract as a whole, not merely by reference to particular words or isolated phrases, but by reviewing each part in light of the others." *LaThrop v. Bell Federal Savings & Loan Assoc.*, 68 Ill. 2d 375, 378, 370 N.E.2d 188, 191 (1977). The language of a settlement agreement must be construed literally in a straightforward manner, and courts must give full force and effect to each and every provision contained in these court-approved agreements. *Robin v. Sun Oil Co.*, 548 F.2d 554, 557 (5th Cir. 1977). Thus, in interpreting the Settlement Agreement between the plaintiffs and TWA, under well-settled rules of contract interpretation, this court must give effect to each and every section of the Agreement, and must read the different sections harmoniously, and accord each section its proper weight, and not read the sections out of context to achieve a desired result as the plaintiffs request.

Section VI, entitled "Eligibility for Re-Employment," is a separate and distinct section of the Settlement Agreement and establishes TWA's obligation to offer retraining to members of the plaintiffs' class and to offer re-employment only to those plaintiffs who satisfactorily complete the flight attendant retraining classes. While it is true that section VI requires TWA to offer retraining within one year following the effective date of the final order, section VI contains no reference to or language establishing a time frame within which TWA must offer the plaintiffs re-employment. Section VI merely obligates TWA to provide the opportunity for re-employment to a certain class of former flight attendants who successfully complete the retraining classes TWA is required to provide. Labeled "Eligibility for Re-Employment," section VI sets forth the conditions under which TWA will offer re-employment to the plaintiffs and there is no language in section VI that explains, defines or even refers to the plaintiffs' right to re-employment once they have become "eligible for re-employment." Thus, we must examine the other language in the contract referring to the time frame and/or the date of re-employment.

Section IX of the Settlement Agreement, on the other hand, is entitled "Re-Employment Procedures." This section states that upon the successful completion of retraining, class members "will be permitted to select assignment to a flight attendant base (or bases) of her choice at which a vacancy exists, provided that no flight attendant having greater seniority desires to fill such a vacancy." Section IX thus sets forth the circumstances under which class members must be re-employed once they have met the eligibility for re-employment set forth in section VI. While section VI conditions the *eligibility* for employment upon the successful completion of flight attendant retraining classes, the language in section IX conditions a plaintiffs' *right* to re-employment upon successful completion of the retraining class *and* upon the

existence of a vacancy at a flight attendant base. As we have stated earlier, the language of sections VI and IX is clear and unambiguous, and must be read harmoniously in order that we might give the proper effect to the plain meaning of the Agreement. *Hanley v. James McHugh Construction Co.*, 444 F.2d 1006 (7th Cir. 1971), and we must read the contract as a whole, and not bifurcate it to reach a desired result. *LaThrop*, 68 Ill. 2d at 381, 370 N.E.2d at 191. We hold that the plain and unambiguous language of the Settlement Agreement, when construed as a whole, requires TWA to offer training classes to members of the plaintiffs' class within one year following the final order date, and further, TWA must offer employment to those class members who successfully complete these retraining classes within the given time frame but ony at such time as a vacancy exists at a flight attendant base.[2]

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[2] The dissent takes the position that the contract is ambiguous with regard to "when those eligible must be rehired," and therefore calls for a remand to consider extrinsic evidence in an attempt to resolve this question. Since we hold the contract is unambiguous the principle of contract construction favoring the reliability of written instruments warrants the exclusion of any such extrinsic evidence. As we recently stated in *Binks Manufacturing Co. v. National Presto Industries, Inc.*, No. 82-1609, slip op. (7th Cir. May 20, 1983):

> "The policy of upholding the integrity of written contracts and favoring written terms over extrinsic evidence is particularly relevant in cases of this nature involving a written contract between two large corporations presumably represented by competent counsel."

Id. at 12-13. Although *Binks* involved the interpretation of Ill. Rev. Stat. ch. 26, § 2-202 (UCC § 2-202) concerning extrinsic evidence, the general policy of "upholding the integrity of written contracts" appears to apply equally as well to the present agreement between a labor association and a corporation which were both represented by competent counsel. That policy mitigates against a remand for a consideration of extrinsic evidence as it mitigated against the consideration of such evidence in *Binks*.

Our decision that the proper interpretation of the Settlement Agreement requires TWA to rehire the plaintiffs only at such time as a vacancy exists at a flight attendant base is supported by this Court's prior approval of the Settlement Agreement in *Air Lines Stewards, Etc. v. Trans World Airlines, Inc.*, 630 F.2d 1164 (7th Cir. 1980). When the union appealed from the district court's approval of the Settlement Agreement, the union argued that the provisions of the Settlement Agreement granting the plaintiffs retroactive seniority would have an "adverse impact" on TWA's current flight attendants. It was the union's position that the Settlement Agreement would adversely affect current employees because if returning class members were granted retroactive seniority they would be able to displace currently employed flight attendants. This court rejected the union's position and interpreted the Agreement as providing that no currently employed flight attendant would be required to lose employment and further held that "providing positions for these reinstated attendants would normally be possible as a result of normal attrition of workers . . . ." 630 F.2d at 1169. It implicitly follows that when a vacancy was created by "normal attrition," those flight attendants who had successfully completed retraining would be offered a position at the flight attendant base or bases where the vacancy existed.

The plaintiffs now contend that TWA is required by the Settlement Agreement to rehire members of the plaintiffs' class without regard to whether vacancies exist and without regard to the rights of current employees. However, we will not permit the plaintiffs to argue in one appeal to this court that the Settlement Agreement does not have an adverse impact on current employees because no employee will be displaced by a returning class member and now assert that the Agreement requires TWA to hire returning class members even though no vacancies exist. If we were to adopt the plaintiffs' argument, TWA

would either have to discharge current flight attendants to make room for returning class members or pay the returning class members their salaries even though there was no work for them to perform. Such an interpretation would defeat the intent of the earlier decision of this court that returning flight attendants would be hired to fill vacancies created by "normal attrition." The plaintiffs' suggested interpretation of the Settlement Agreement is not based on sound financial policy, finds no support in the language of the Agreement itself, and ignores the economic impact this interpretation would have on TWA. Courts not only have the obligation to operate within the law, but must also continue to be aware of economic reality and show fiscal responsibility in their decisions and we will not participate in dragging TWA into financial stress. As we interpret the plain and unambiguous meaning of the Settlement Agreement, we can find absolutely no language requiring, and we decline to order TWA to pay returning flight attendants their full salaries if TWA does not have a vacancy at a flight attendant base at the particular time the returning attendants complete the retraining classes.

The district court agreed with the plaintiffs' argument that the offer of re-employment was conditioned only upon the successful completion of retraining classes and that TWA was required to offer the plaintiffs reemployment regardless of whether or not TWA currently had vacancies at any flight attendant base. This argument ignores financial reality in that such a reading of the Settlement Agreement would require TWA to pay the plaintiffs their salaries even if the plaintiffs were not serving in the air as flight attendants. There was no language in the Settlement Agreement requiring TWA to accept this "featherbedding" approach advocated by the plaintiffs.

We hold that the clear and unambiguous language of the Settlement Agreement requires TWA to offer retrain-

ing to members of the plaintiffs' class within one year from the entry of the final order and further to offer re-employment to those plaintiffs who successfully complete the retraining classes at such time as a vacancy exists at a flight attendant base, and therefore, we reverse the district court's decision granting the plaintiffs' motion to compel TWA to rehire the plaintiffs at the completion of their retraining classes without regard to whether current vacancies exist.

WEIGEL, J., dissenting.

I respectfully dissent. I agree that the contract requires satisfactory completion of retraining as a condition precedent to the right to reemployment. But I do not agree (as the majority of the panel does) that the contract is unambiguous in limiting the obligation to rehire to "such time as a vacancy exists at a flight attendant base". Nor do I agree (as the District Court concluded) that the contract is unambiguous in requiring rehiring "no later than the end of the last retraining class".

I deem the contract so ambiguous and imprecise in designating the time when those eligible must be rehired as to call for extrinsic evidence to aid in resolving the question. *See DeGraff v. Kaplan*, 109 Ill. App.3d 711, 440 N.E.2d 930, 933 (1982); and *Pioneer Trust and Savings Bank v. Lucky Stores, Inc.*, 91 Ill. App.3d 573, 414 N.E.2d 1152, 1154 (1980).

Accordingly, I would remand to the trial court for its prompt consideration of such extrinsic evidence. But if it be concluded that the law does not require the taking of such evidence, I would affirm for the reasons stated by the District Court in the order entered October 5, 1982. That is to say this: Absent extrinsic evidence clarifying the time for rehiring, I deem the basic purpose of the contract to call for rehiring consistently with the order of the District Court and would, therefore, affirm.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit